Supreme Court of the United States

OCTOBER TERM 1939

No. 40

THE UNION STOCK YARD AND TRANSIT COMPANY OF CHICAGO,

Appellant,

vs.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, *et al.*

Appellees.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

BRIEF FOR APPELLANT

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OPINION BELOW

The case below is unreported.

JURISDICTION

Final decree of the Court below dismissing appellant's bill of complaint was entered on March 9, 1939 (R. 119), and appeal allowed on April 7, 1939. (R. 154) The jurisdiction of this Court is invoked under Section 210 and Section 238(4) of the Judicial Code as amended by the Act of February 13, 1925, c. 229, 43 Stat. 938. (28 U. S. C. A., Secs. 47a and 345) Probable jurisdiction was noted by this Court on May 22, 1939.

THE STATUTES INVOLVED

The pertinent provisions of the Interstate Commerce Act and of the Packers and Stockyards Act, 1921, are set forth in Appendix A hereto.

STATEMENT

This is an appeal from a final decree of a statutory court for the Northern District of Illinois, dismissing the appellant's bill of complaint to set aside an order of the Interstate Commerce Commission, directing the appellant to withdraw a tariff whereby it sought to cancel its tariff theretofore filed with the Commission which names its charges for loading and unloading livestock at the Chicago stockyards as agent for the carriers. *Cancelation of Livestock Services at Chicago*, 227 I. C. C. 716. The record made before the Commission, including all exhibits, was introduced in evidence at the hearing in the District Court, together with two other exhibits. (R. 158-159, 164-739) No other evidence was received by the District Court.

1. History of the Case.

Appellant was incorporated by a special Act of the Legislature of Illinois in 1865. It was authorized by its charter to construct and operate a general Union Stock Yard for livestock, to erect and operate a hotel, and to construct and operate a railroad to connect its stockyard with the tracks of railroads terminating in Chicago. (R. 29, 645-650)

Thereupon it acquired approximately a half section of land in what is now the City of Chicago, and constructed a stockyard. This yard was opened for business on Christ-

mas Day 1865 and has since then been operated by the appellant. In addition to constructing a stockyard, appellant also constructed a hotel for the accommodation of its patrons, and a railroad connecting with the trunk-line railroads entering the City of Chicago and providing access to its yard. (R. 29, 228-230, 365)

Prior to 1887 appellant operated its facilities in its own name. From 1887 to 1893 the railroad facilities were operated by a transfer association controlled by the carriers. From 1893 to 1897 appellant operated both its stockyard and railroad facilities in its own name. In 1897 it leased its railroad tracks, property and equipment for a term of fifty years to the Chicago & Indiana State Line Railway Company, retaining for itself the loading and unloading platforms and other facilities used in connection with its stockyard business. (R. 29)

On January 1, 1898 the lessee company was consolidated with another railroad company and the consolidated company became known as Chicago Junction Railway Company, hereinafter referred to as the "Junction." (R. 29, 231) Under the terms of the 1897 lease appellant received from the original lessee, and subsequently from its successor, the Junction, two-thirds of the profits derived from the operation of the leased properties. (R. 29-30) The trunk-line railroads entering Chicago were granted trackage rights for the handling of livestock with their own equipment and crews over the railroad operated by Chicago & Indiana State Line Railway Company, and later by the Junction. (R. 30, 232)

In 1907 the Junction sold a belt line which it operated around the City of Chicago, retaining and operating

only those railroad properties owned by the appellant which had been leased by it under the fifty-year lease of 1897. (R. 30, 231-232) About the same time The Chicago Junction Railways and Union Stock Yards Company, a holding company organized under the laws of the State of New Jersey (hereinafter called the "New Jersey Company") acquired practically all of the stock of the appellant, as well as all of the stock of the Junction. (R. 30, 232)

In 1912 the United States, at the request of the Interstate Commerce Commission, brought an action against appellant, the New Jersey Company, and the Junction, to enjoin the payment of a bonus to a packing concern known as Louis Pfaelzer & Sons, and to compel appellant and the Junction to file tariffs and reports pursuant to the provisions of Sections 6 and 20 of the Interstate Commerce Act. (R. 30-31, 232) This Court in that case, *United States v. Union Stock Yard*, 226 U. S. 286, held that appellant and the Junction, because of their common ownership and collective activities, were engaged in the common enterprise of operating a railroad and hence were subject to the jurisdiction of the Interstate Commerce Commission.

As a result of this decision, appellant filed a tariff with the Commission naming its charges against the railroads for loading and unloading of rail-borne livestock. (R. 31, 233, 288) Practically from its inception appellant had performed this service for the trunk-line railroads and had been paid by them, and the filing of the tariff in no way changed this practice. (R. 34, 233)

On December 1, 1913, shortly after the decision of this Court in said case, the lease of appellant's railroad properties made in 1897 was cancelled and a new indenture executed by appellant and the Junction, in which appellant

granted, demised and leased its railroad property and equipment to the Junction in perpetuity at a fixed rental of $600,000 per year. (R. 31, 233, 681) This indenture contains no defeasance clause or other provision giving appellant the right to recover possession of the properties or equipment covered by the indenture. (R. 681-689) Thereafter appellant attempted to withdraw its tariff from the files of the Commission, but was prevented from doing so by an order of the Commission predicated primarily upon the ground that while an annual rental for the use of the railroad properties had been substituted for a division of earnings, as rental therefor, the affiliation between the operator of the railroad and the stockyards still continued. *Live Stock Loading and Unloading Charges,* 52 I. C. C. 209, 58 I. C. C. 164. (R. 31, 234-235)

On May 19, 1922 the Junction (with appellant consenting thereto) leased the railroad properties granted, demised and leased to it by appellant in 1913, together with some other railroad properties which it had acquired, to The Chicago River and Indiana Railroad Company (hereinafter called the "River Road") for a period of 99 years, and thereafter, at the election of the lessee, in perpetuity, at a fixed annual rental. At the same time all of the capital stock of the River Road was acquired by the New York Central Railroad Company. (R. 32, 235-240, 651) Upon the execution of the 1922 lease the Junction cancelled its tariffs and ceased doing business as a common carrier. (R. 239, 423) The making of the lease, the acquisition of the capital stock of the River Road, the cancellation of its tariffs by the Junction and its cessation of business were all done pursuant to law and with the approval and authority granted by the Interstate Commerce Commission in

Chicago Junction Case, 71 I. C. C. 631, 150 I. C. C. 32. (R. 32, 607, 631) Since the execution of the lease, the railroad business previously carried on by the Junction has been carried on by the River Road as a part of the New York Central System, over which neither the appellant, nor the Junction, nor the New Jersey Company has exercised or can exercise any control whatsoever. (R. 240-241, 298) Since the lease of the aforesaid railroad properties to the River Road, the appellant has neither operated nor been affiliated with the management or operation of any railroad, and has never shared in the profits of any common carrier by railroad. (R. 233, 240, 298, 356-357, 364-365, 651-680)

2. The Proceedings before the Commission.

In 1935 appellant filed tariffs with the Commission proposing to cancel its tariff then on file which named its charges for the loading and unloading of livestock at the yards as the agent of the railroads. These cancellation tariffs were suspended by the Commission, which on December 11, 1935 ordered their withdrawal. *Live Stock Loaded and Unloaded at Chicago*, 213 I. C. C. 330. (R. 23, 28-42) Thereafter, appellant filed a petition for rehearing. (R. 245, 712) As stated in the Commission's report in the instant case:

> "The chief basis for the request for further hearing was an offer to prove that we had not required the filing of loading or unloading tariffs by stockyard companies located at other points where the circumstances and conditions in connection with the loading and unloading services were alleged to be similar to those obtaining at petitioner's yard. In this connection the Yard Company alleged that

the practical construction of the act by us had been that it was not applicable to services or charges for loading or unloading livestock at public stockyards other than Chicago. Descriptions of the alleged conditions existing at a number of other stockyards were included in the petition." (R. 23-24)

This petition the Commission denied.[1] (R. 245)

Thereafter appellant again filed a tariff with the Commission proposing to cancel its charges for the loading and unloading of livestock at the yards as the agent of the railroads. This tariff was suspended by the Commission in the investigation and suspension proceeding in which the order here assailed was entered. (R. 16-18, 20-21, 24)

On the hearing which ensued a record was made which not only contained the essential facts introduced in the previous case but also contained many facts designed to show that the conclusions of the Commission in the earlier case were wrong. Appellant also sought and attempted to show by specific facts that the Interstate Commerce Commission and public stockyards throughout the United States and the railroads serving such public stockyards had for many years by practical construction interpreted the Interstate Commerce Act as not applicable to stockyard companies which loaded and unloaded livestock for railroads. The Examiner of the Commission refused to receive this evidence. (R. 25-26, 538, 548-549) The general character of the rejected evidence and the purposes for which it was

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[1]The appellant also brought suit to set aside the aforesaid order of the Commission. After the denial of the petition for rehearing, appellant elected not to proceed with this suit on the record as made before the Commission, and it was dismissed without prejudice on stipulation of the parties. (R. 244-245, 728-729)

proffered are set forth in Section 10 of the bill of complaint (R. 8-11), and will be discussed in more detail hereinafter in the course of the argument.

Subsequent to the close of the hearing, appellant petitioned the Commission for a further hearing, seeking a review of the ruling of the Examiner excluding the evidence described, and praying that the Examiner be directed to receive the same, or, in the alternative, that the appellant be permitted "to make offers of proof of specific facts in respect of any such evidence not received, or deemed immaterial or irrelevant," a right which had been previously denied by the Examiner. (R. 26, 164-199) This petition the Commission denied upon the ground that "the status of other stockyards companies throughout the country was not material to the issue in this proceeding." (R. 26, 199) Thereafter the Commission entered its report and order directing the appellant to withdraw its cancellation tariffs, to set aside which this suit was brought. (R. 22, 55) The effective date of the order has been postponed to January 1, 1940. (R. 643)

3. Nature of appellant's business and service.

Appellant operates no railroad, transports no persons or property for hire, has no motive power or railroad equipment, and exercises no control, directly or indirectly, over and has no affiliation with any person engaged in the carriage of either freight or passengers. (R. 240, 298, 356-357, 364-365) It does not hold itself out to carry persons or property for hire, and does not possess or operate the facilities necessary to conduct such transportation. (R. 239-240) The District Court found that "Since May, 1922,

neither plaintiff [appellant] nor the Chicago Junction Railway Company has operated any railroad or transported any person or property." (R. 118)

Appellant's activities are confined to the operation of a public stockyards and its charges are subject to the jurisdiction of the Secretary of Agriculture under the Packers and Stockyards Act. (R. 241, 252-253, 576-602) As an integral part of its stockyards service, appellant loads and unloads livestock, but solely, as expressed in its tariff, "as a carrier's agent." (R. 16-17, 248-249) The charges which it receives for such service are paid by the railroads for which it is performed, and not by the shippers and owners of livestock. (R. 249) It is not itself a shipper, consignee or owner of livestock. (R. 334-335, 558) In connection with its loading and unloading service it provides the necessary platforms, chutes, pens and other facilities, and men trained in the performance of this sort of work who are familiar with the properties and methods of operation and able to keep the animals thus handled moving steadily through the yards, and to prevent any congestion or delay in the unloading of subsequent arrivals, or in connection with the loading of outbound shipments. (R. 252-258, 283-286)

4. The Report of the Commission.

The decision of the Commission was not unanimous. Mr. Commissioner Aitchison filed an opinion concurring "in the result" on the evidence before the Commission, but expressing the view that the objections to the excluded evidence relating to conditions at other yards should have been overruled, and that "what the decision would be with the proffered evidence before us cannot now be deter-

mined." (R. 42) Commissioners Meyer, Eastman and Porter dissented, each filing a separate dissenting opinion. (R. 42, 43, 45, 57) Commissioner Lee did not participate in the proceeding. (R. 55)

The division in the Commission did not turn upon any disagreement as to the essential facts of record—which were not and are not in dispute—but solely upon their legal effect. Since the questions of law upon which the Commission divided are those upon whose determination the decision of this Court must rest, it may be helpful to state the conclusions of the majority and minority respectively, and the reasoning upon which they were based.

4a. The Majority Report.

The majority report consists of two parts—the main report (R. 22-28) and an appendix (R. 28-42), the latter being a reprint of the Commission's report in the previous (1935) case. (R. 26). The main report is confined largely to a description of the steps taken by the appellant to bring about a reconsideration of the issue by the Commission, including a description of the nature of the excluded evidence sought to be introduced, first on petition for rehearing in the previous case, and second, at the trial of the instant case, and the action of the Commission thereon. Consequently the body of the report is to be found in the appendix.

In the appendix the majority reviews at considerable length the history of the appellant and the successive changes in its relation to the operation of the railroad authorized to be built by it under its charter (R. 29-32), substantially as set forth in the foregoing statement of facts.

Attempting to answer the appellant's contention that because of the fact that the prior decision of this Court in *United States* v. *Union Stock Yard, supra,* was based upon the then existing affiliation of the appellant with a company operating a railroad, it is no longer controlling (R. 32), the majority in the appendix to its report, among other things, said:

> "In the *Union Stock Yards* case, *supra,* the Court also said at page 305:
>
> "They [respondent and the Junction] are common carriers because they are made such by the terms of their charters, hold themselves out as such and constantly act in that capacity, and because they are so treated by the great railroad systems which use them."[2] (R. 34)

And in the main report the Commission supplements its observations in its previous report, as set forth in the appendix, by saying:

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[2]As evidenced by the argument which follows, it is the contention of the appellant (1) that whether a given person or corporation is a common carrier and as such subject to the jurisdiction of the Commission is to be determined not by its charter powers but by what it does; (2) that since the lease of its properties to the River Road, neither the appellant nor any corporation affiliated therewith holds itself out or acts in the capacity of a common carrier by railroad; and (3) that appellant is not treated by the great railroad systems which employ its services in the loading and unloading of livestock as a common carrier of such livestock by railroad or otherwise, but merely acts as an agent of such railroad systems for the performance in their behalf of a duty imposed upon them by the Interstate Commerce Act, and for which the Interstate Commerce Act forbids the exaction of any charge by them in addition to the line haul rate for the carriage of such livestock to or from the yards.

> "As stated, one of the contentions of the Yard Company is that in the lease of 1922, it divested itself of its common carrier status. We do not believe that such divestiture can be accomplished by contract."[3] (R. 27)

The majority report also points out that the loading and unloading of livestock at public stockyards are "transportation services within the definition of the Act" (R. 34), and are an inseparable part of the railroad transportation service. (R. 36) Although the majority report thus purports to be based in part upon the fact that the services performed are within the definition of "transportation", which the Act contains, and hence an indispensable part of the "railroad transportation" which the Act makes it the duty of the railroad companies themselves to perform, yet it expressly disavows a construction of the Act which would draw within the jurisdiction of the Commission all persons performing transportation services, as defined in the Act, as the agent of the railroads, saying:

> "We do not entertain the view that every terminal agency, performing for the railroads some service falling within the definition of 'transportation' contained in section 1 (3) could, or should, be held to be a common carrier subject to the act." (R. 39)

This caveat was obviously introduced into the majority report in recognition of the decision of this Court in *Ellis v. Interstate Commerce Commission*, 237 U. S. 434, in

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[3] In the argument which follows it is pointed out that the Commission itself, pursuant to the provisions of the Act, authorized the lease by reason of which appellant was divested of its common carrier status.

which the Court held that, although the Armour Car Lines was performing icing service for the carriers, a service also included within the statutory definition of transportation, the car line company was not itself a common carrier and as such subject to the jurisdiction of the Commission, and that the Commission's jurisdiction over charges for icing service was acquired solely through its jurisdiction over the railroads themselves which published and exacted such charges from the shippers. Nowhere in its report does the majority point out or give expression to any rule of interpretation, through whose application some persons performing, as agents of the railroad, an auxiliary service embraced in the statutory definition of transportation, thereby become common carriers, and hence themselves subject to the jurisdiction of the Commission, and others do not.

Throughout its report the majority lays great stress upon Sec. 15(5), providing that transportation of ordinary livestock in carload lots, destined to or received at public stockyards, shall include the service of loading and unloading, which shall be performed without extra charge therefor to the shipper, thus imposing upon the railroad company the duty of providing such service, either itself or through an agent, without additional charge.

The report concedes that in the performance of this service the appellant acts solely as the agent of the carrier in the execution of its duties to the shipper and performs no duties for the shipper as such, and collects no charges therefrom. (R. 41-42) The majority appears to have been of the view—mistakenly, we believe, as did also the dissenting minority—that by reason of the provisions of this Section an agent performing such service for the carrier and making no charge to the public therefor becomes a common

carrier, whereas other agents performing other services for the railroad—whether separately charged for or not—do not. The majority in its report assigns, however, no reason why a public stockyards company performing, as agent of the railroad company, a service which the Act requires the railroad to perform, and which is included within the definition of transportation, is a common carrier, while private car line companies, elevator operators, persons operating icing stations, as the railroad company's agent—whether by contract or otherwise—are not.

It also plainly appears from the report that the majority was influenced by its belief that the appellant was engaged in a public calling—as it is—, that all of its charges should be subject to public regulation, and that, unless it be held to be a common carrier, its loading and unloading charges are beyond the reach of public authority because, in the opinion of the majority, they are not among the charges over which the Secretary of Agriculture has jurisdiction under the Packers and Stockyards Act. (R. 38) Consequently the Commission finds that:

> "Since it [the appellant] is not a water carrier, a pipe line, or express company, in order to be a common carrier subject to the Act, it must be a common carrier by railroad." (R. 38)

This, although it carries nothing by railroad, or otherwise.

In respect of the Commission's assumption that unless the appellant's loading and unloading charges are subject to the jurisdiction of the Commission, they are beyond the reach of regulatory authority, it is the contention of the appellant (1) that the Commission may not usurp the legis-

lative power of Congress by the exercise of an authority not conferred upon it, and (2) that, as held by dissenting Commissioners, charges for all services performed by a public stockyards, including the loading and unloading of livestock, are within the jurisdiction of the Secretary of Agriculture, and that the majority's apprehension that unless a public stockyards, which carries nothing, be nevertheless deemed to be a common carrier, its loading and unloading charges are, under existing law, beyond the reach of public authority, is wholly groundless. (R. 45, 57)

4b. Dissenting Opinion of Mr. Commissioner Meyer.

Mr. Commissioner Meyer dissented for the reasons stated in his dissent in the previous case. (R. 42) His dissenting opinion in that case was short and is as follows:

> "If the conclusions set forth in this report be sound, this Commission has jurisdiction over every stockyard in the United States. I am not persuaded that Congress has given us such jurisdiction. I had supposed that the Department of Agriculture had been given jurisdiction over all charges for stockyard services, and that the fact that loading and unloading livestock are transportation services within the meaning of the act does not make every agent who performs such services a common carrier by railroad subject to the act. An individual may, and often does, perform for a common-carrier railroad a portion of its transportation service, but this does not make the individual who, like the Stock Yards Company, operates no railroad, a common carrier by railroad. In Docket No. 7008, *Atchison, T. & S. F. Ry.* v. *Kansas City S. Y. Co.*, 33 I. C. C. 92, this Commission unanimously held that the Kan-

sas City Stockyards Company was not a common carrier engaged in interstate commerce. Although many changes have taken place since that time, the basic principles discussed and relied upon therein are as sound today as they were then. The instant report is a reversal of those principles.

"If it is thought that this Commission should have jurisdiction over all services and charges of all stockyards, whether common carriers or not, we should ask Congress, rather than the Supreme Court, to bestow that jurisdiction upon us." (R. 57)

4c. Dissenting Opinion of Mr. Commissioner Eastman.

Mr. Commissioner Eastman filed a short separate dissenting opinion. In respect of the prior decision of this Court in *United States* v. *Union Stock Yard, supra,* upon which the majority so heavily relied, Mr. Commissioner Eastman said:

"The Yard Company, in my judgment, is not now a common carrier by railroad. Past decisions of the Supreme Court that it was such a carrier rested upon its conjunction in ownership, operation, and service with a line of railroad. Such conjunction ceased when the line of railroad was leased, practically in perpetuity, to the New York Central.

"The facts that the Yard Company has a remote reversionary interest in part of the line of railroad, and that it has charter power to operate a railroad, including the right of eminent domain, do not make it a carrier by railroad. That is dependent upon what it does. Such attendant circumstances are at times of significance in determining the nature of what is done, but not otherwise. Nor is the Yard Company a carrier by railroad because, in the lease, it covenants to exercise its right of eminent domain at the request and for the benefit of the lessee. That

covenant is, in substance and effect, equivalent to a transfer of the right to the lessee along with the property." (R. 43)

Addressing himself to the circumstance that the statute made it the duty of the railroad company itself to provide a loading and unloading service without extra charge, he said:

"* * * The fact, however, that it is the duty of a railroad to deliver livestock at public stockyards into pens and to make sure that the latter are 'suitable' does not make the pens railroad premises, any more than the delivery by a motor carrier of shipments into the home or place of business of a consignee makes that home or place of business motor carrier premises.

"There is nothing to prevent a railroad, where it has the duty of loading and unloading freight, from performing the duty through an agent, and that is often done. In no instance that I know of, other than that now before us, has it been contended that an agent so employed by a railroad for the loading and unloading of freight is, because of such agency and employment, a carrier by railroad. * * *" (R. 43-44)

Addressing himself to the fact, stressed by the majority, that the railroads are required to employ the appellant to perform this service, and to the fear expressed by the majority that, unless the Commission has jurisdiction over the appellant's charges, it may exact exorbitant compensation for such services, he said:

"This fear, I believe, underlies the decision of the majority, and I am not prepared to say that it is a baseless or unreasonable fear, if the charges of

the Yard Company for this service are to go unregulated. That is, of course, not a reason for finding that the Yard Company is a carrier by railroad, but only goes to show that a situation exists which may be in need of remedy, perhaps by further legislation.

* * * * * * * *

"Why is it that the Yard Company is in a position to insist upon loading and unloading the livestock for the railroads and therefore to enjoy a virtual monopoly of this employment? The answer to this question, I take it, lies in the fact that the Yard Company is a public stockyards and that the loading and unloading of the livestock is so intimately related to the proper conduct of that public business that it cannot well be divorced therefrom and placed under separate supervision. As I see it, therefore, although the law has made the loading and unloading of the livestock a duty of the railroads, it is a duty which must be performed, when the livestock is delivered to or received from a public stockyards, through the agency of those who are in charge of the stockyards, because it is essentially a part of the stockyards service.

"While this may seem to be an anomalous situation, it is one which need give rise to no overlapping of jurisdictions or difficulties of administration. So far as the shippers are concerned, the loading or unloading of the livestock is a railroad service the compensation for which must ordinarily be included in the line-haul rates, and we have full jurisdiction over those rates, and also over any separate charges which the railroads may at times assess for the service. So far as the railroads are concerned, the loading or unloading is a service which must be performed for them, at a public stockyards, by those in charge of the stockyards, because it is an inextric-

able part of stockyards service. It follows, therefore, that the charges made against the railroads for such service at a public stockyards are subject to the jurisdiction of the Secretary of Agriculture under the Packers & Stockyards Act.

"From an administrative standpoint, the division of duties which would result from this construction of the law would simplify matters, in comparison with the situation which will result from the decision of the majority. Under the latter decision, the Yard Company will be partly under the jurisdiction of this Commission and partly under the jurisdiction of the Secretary of Agriculture, involving much duplication of work. On the other hand, under the construction of the law which I believe to be sound, the Yard Company would be wholly under the jurisdiction of the Secretary of Agriculture." (R. 44-45)

4d. Dissenting Opinion of Mr. Commissioner Porter.

Mr. Commissioner Porter filed a separate and somewhat more elaborate dissent. Supplementing what had been said by Mr. Commissioner Eastman in respect of the non-applicability to the existing situation of the decision of this Court in the *Union Stock Yard* case, Mr. Commissioner Porter said:

"The record in the present case discloses that the Yard Company does not now operate any railroad tracks or equipment. In other words, I cannot find that it is literally within the provisions of section 1, paragraph 1, as a common carrier engaged in the transportation of passengers or property by any of the means there specified.

"In *United States* v. *Union Stock Yard*, 226 U. S. 286, the Supreme Court held that the Yard

Company was then a common carrier subject to the Act. *In so holding the court rested its decision upon the fact that the Yard Company and the Chicago Junction Railway were closely affiliated by the ownership of practically all of the shares of both by the New Jersey holding company.* At that time the Chicago Junction Railway was the operator as lessee of the railroad properties owned by the Yard Company. The Yard Company as a separate corporate entity was not engaged as a common carrier by railroad, but it was so closely affiliated with the railroad through ownership of the stock of both by the holding company that all three were deemed by the Supreme Court to be practically one concern. The courts have often disregarded corporate form and looked to the substance. Since that decision material changes have taken place. The railway properties owned by the Yard Company (which had been leased to the Chicago Junction Company) have since been leased to the Chicago River & Indiana Railway Company and all of the capital stock of the latter company has been purchased by the New York Central Railroad Company, these transactions having been approved by the Commission in the *Chicago Junction* case, 71 I. C. C. 631, Finance Docket No. 1165, decided May 16, 1922, subject to the 17 conditions there specified, one of which (No. 14) was later modified in a supplemental report, 150 I. C. C. 32. The present record shows that this lease and purchase of stock were effected May 19, 1922, immediately after the report of May 16, 1922.

"So that the connection between the Yard Company and the operator of the railroad has been severed. It is true the Yard Company is still affiliated with the corporation, the Chicago Junction Railway Company, *but the latter is no longer the operator of the railway.* It now occupies merely the status of a

non-operating lessor company. At this time there is no affiliation through stock ownership between the Yard Company and the operator of the railroad. It can not now be said that the Yard Company and the railway operator are practically departments of the same concern. The investment company no longer holds the controlling interest in both the Yard Company and the railway operator. The Supreme Court could not now say, as it did in the 226 U. S. 286, that 'these companies'—referring to the Yard Company and the Chicago Junction Railway Company—'because of the character of the service rendered by them, their joint operation and division of profits and their common ownership by a holding company, are to be deemed a railroad within the terms of the Act of Congress to regulate commerce, and the services which they perform are included in the definition of transportation as defined in that Act.' *In referring to the 'service rendered' by the two companies the Court obviously did not have in mind merely the loading and unloading service. It had in mind the service previously referred to in the opinion, namely, both the loading and transporting,* the Court having previously said that the Yard Company and the Chicago Junction Railway, together, as to freight which is being carried in interstate commerce, engage in transportation within the meaning of the Act and perform services as a railroad when they take the freight delivered to the stock yards, load it upon cars and transport it for a substantial distance upon its journey in interstate commerce.

"It seems obvious from the opinion that the Court could not find the Yard Company to be a 'common carrier by railroad' by reference to its service, status, and activities considered separately and apart from those of the railroad." (Italics ours.) (R. 46-48)

After referring to certain intervening decisions of the Commission and this Court, he ends his discussion by saying:

> *"The conclusion is inescapable* that the changes which have taken place since the Supreme Court's and the Commission's decisions above referred to have removed the basis of those decisions and that they are no longer authority for holding the Yard Company to be a common carrier subject to the Act." (Italics ours.) (R. 49-50)

Supplementing what had been said by Mr. Commissioner Meyer and Mr. Commissioner Eastman in respect of the fact that the service performed is within the definition of "transportation" as contained in the Act, he said:

> "The Yard Company performs certain services in connection with the receipt and delivery of property transported, namely, the loading and unloading of livestock shipped from and delivered at the Union Stock Yards by common carriers by railroad in interstate commerce, and plainly, therefore, it performs a transportation service, but this fact alone would not bring it within the provisions of the Act. A carrier may employ any person to perform its loading and unloading service, but the fact of such employment or agency does not alone make that person a common carrier. Often this service is performed by the shipper, and if under the circumstances it is the duty of the carrier to perform the service, then the shipper is performing for the carrier a part of its transportation service and may be compensated therefor under the provisions of section 15(13), as in the *Diffenbaugh* case, 222 U. S. 42, and many others. But this fact does not make the shipper a common carrier subject to the provi-

sions of the Act. The service itself is subject to regulation by the Commission by orders addressed to the railroad company. * * *

"In many instances throughout the United States independent stockyards companies (not owned or controlled by the railroad companies) perform the service of loading and unloading livestock for the railroads, as at Benning, D. C. (see *Adolph Gobel, Inc.* v. *Baltimore & O. R. R. Co.*, 200 I. C. C. 606), and at Cincinnati (see *E. Kahn's Sons Co.* v. *Baltimore & O. R. R. Co.*, 192 I. C. C. 705), but the Commission has never asserted jurisdiction over these stockyards companies on this ground." (R. 52)

After referring to and quoting from the decision of this Court in *Ellis* v. *Interstate Commerce Commission*, 237 U. S. 434, Mr. Commissioner Porter concluded his dissenting opinion as follows:

"It will be noted that the test there applied was whether the Armour Car Lines was in fact a carrier, that is, whether it carried anything. Here the Union Stock Yards, which does not operate a single foot of railroad, is in fact not a carrier by railroad. True, it still owns the railroad, and under section 20 of the Act may be required to file annual reports with the Commission, for that section empowers the Commission to require annual reports not only from common carriers subject to the provisions of the Act, but also 'from the owners of all railroads engaged in interstate commerce as defined in this Act.' But owners of railroads are not subjected to the other provisions of the Act by Section 1, and where an owner of a railroad has leased it to another, as in the present case, he is not a common carrier by railroad." (R. 55)

5. The Findings and Conclusions of the District Court.

The District Court made twelve findings which it called "Findings of Fact", although some of them (*e.g.*, Nos. 8, 9 and 11) are actually conclusions of law. In addition, it made five conclusions of law. (R. 116-119) The appellant took exception to all of these findings of fact and conclusions of law except Nos. 1 and 5 of the findings of fact. (R. 136) Finding of fact No. 1 stated the nature of the suit below. Finding of fact No. 5 read as follows:

> "Since May, 1922, neither plaintiff nor the Chicago Junction Railway Company has operated any railroad or transported any person or property."

In addition to excepting to the District Court's findings and conclusions, appellant made a motion in the District Court for the amendment of its findings, for the allowance of additional findings, and for amendment of the final decree. (R. 121-140) It therein pointed out in detail wherein the Court's findings were erroneous and incomplete.[4]

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[4]The record references to the evidence in support of the appellant's requested findings are as follows: No. 2 (R. 123): R. 229, 645-650; No. 3 (R. 123-124): R. 229, 241, 252-253, 700A-700D; No. 4 (R. 125-126): R. 29-32, 230-240, 298, 423, 607, 631, 651, 681, 738A-739; No. 9 (R. 129): R. 248-249, 283-286; No. 12 (R. 130-131): R. 248-251, 254, 283-286; No. 1 (additional) (R. 131-132): R. 29-32, 34, 230, 241, 248-251, 254, 293; No. 2 (additional) (R. 132-133): R. 16-17, 240, 248-249, 254-255, 292-293, 365, 393-411, 440-441, 457, 586-587, 594, 599, 731-732; No. 3 (additional) (R. 133): R. 229-230, 248-249, 252-253, 576-599; No. 4 (additional) (R. 133-134): R. 164-199, and references to Record contained in Section IV of the argument, which follows; No. 5 (additional) (R. 135): R. 233, 239-240, 248-249, 254-255, 292-293, 298, 356-357, 364-365, 393-411, 440-441, 554-558, 651, 681.

The District Court's finding No. 6 contains a statement that "the only question in issue is the jurisdiction of the Interstate Commerce Commission to make the order" sought to be set aside, and that the plaintiff (appellant) does not question the "sufficiency" of the evidence to support the finding or of the findings to support the order. There are two questions in issue, viz., the jurisdiction of the Commission, and its failure, by reason of its rejection of certain evidence referred to in the foregoing statement, to accord to the appellant that full and fair hearing required by the statute. This refusal was assigned in the appellant's petition to the District Court as error. Moreover, whether the Commission had jurisdiction or not depended upon whether or not the appellant was a common carrier by railroad. If by this finding the Court meant to say that the appellant did not question the sufficiency of either the evidence or the findings to support the finding of the Commission that the appellant was such a carrier, then the Court's finding is clearly erroneous. Sufficiency of both the evidence and of the findings in this respect were challenged in the appellant's Bill of Complaint. (R. 13-14) The Court's finding was not only excepted to (R. 136), but the error of the Court's finding—if it is to be construed as above—expressly called to the attention of the Court. (R. 127)[5] That the fairness of the hearing was also in issue, see also not only Bill of Complaint but appellant's requested finding No. 10 (R. 113), appellant's requested conclusions of law, presented prior to the entry of the Court's findings, No. 3 (R. 116), appellant's requested

[5]See, also, appellant's requested finding No. 5 (R. 135) and Appendix to motion for amendment of finding (R. 136-140).

additional finding No. 4 (R. 133), appellant's conclusion of law No. 6 (R. 136), requested after the entry of the Court's findings and in connection with the exceptions thereto.

THE QUESTIONS PRESENTED

Sec. 1 of the Interstate Commerce Act provides:

> "That the provisions of this act shall apply to *common carriers* engaged in
>
> "(a) The transportation of passengers or property wholly by railroad, * * *." (Italics ours.)

Sec. 6 of the same Act requires that every common carrier subject to the provisions thereof shall file with the Commission schedules setting forth its charges.

Sec. 301 of the Packers and Stockyards Act provides:

> "Sec. 301. When used in this Act—
>
> "(a) The term 'stockyard owner' means any person engaged in the business of conducting or operating a stockyard;
>
> "(b) The term 'stockyard services' means services or facilities furnished at a stockyard in connection with the *receiving*, buying, or selling on a commission basis or otherwise, marketing, feeding, watering, *holding, delivery, shipment*, weighing, or *handling, in commerce*, of livestock;" (Italics ours.)

Sec. 304 of the same Act provides:

> "It shall be the duty of every stockyard owner * * * to furnish upon reasonable request, without discrimination, reasonable stockyard services * * *."

Sec. 305 of the Act provides:

> "All rates or charges made for any stockyard services furnished at a stockyard by a stockyard owner * * * shall be just, reasonable, and nondiscriminatory * * *."

Sec. 306 requires every stockyard owner to file with the Secretary of Agriculture schedules showing its rates and charges, and Sections 309, 310 and 311 confer upon the Secretary power, either upon complaint or in an inquiry instituted upon his own motion, to fix and prescribe reasonable rates for such services.

As appears from its legislative history, the purpose of the Packers and Stockyards Act was to confer upon the Secretary of Agriculture a jurisdiction over the rates for services performed by a stockyards company similar to that which had been conferred upon the Interstate Commerce Commission over railroad rates.

In view of the foregoing, the following questions are presented:

1. Is every public stockyard company in the United States—of which there are many—which loads and unloads livestock at its yards, as the agent of the railroad or railroads receiving and delivering livestock at such yards, a common carrier, and as such subject to the jurisdiction of the Commission in respect of its charges for loading and unloading, or are its charges for such service, like all other of its charges, subject to the jurisdiction of the Secretary of Agriculture under the Packers and Stockyards Act?

2. If in answer to the foregoing question it be held that such a public stockyard is not subject to the jurisdic-

tion of the Commission but to that of the Secretary of Agriculture, is there anything peculiar to the operations of the appellant at its stockyard which removes it from the rule applicable to stockyards generally, and by reason of which its charges for such service are subject, not to the jurisdiction of the Secretary, but to that of the Commission?

3. As appears from the foregoing statement and from the report of the Commission itself, the Commission excluded material evidence proffered by the appellant concerning the situation at other public stockyards, and the practical construction given to the Act, as applied to such yards, over a period of years by the Commission, the railroads and public stockyards. In addition to excluding such evidence, the Commission refused to permit the appellant to make specific offers of proof of the evidence it refused to receive or even to have exhibits containing such evidence marked for identification. (R. 164-199, 538, 548-549, 566) A third question, therefore, which arises is whether the appellant was denied that full and fair hearing to which it was entitled.

SPECIFICATION OF ERRORS

A specification of such of the points raised by the assigned errors as are intended to be urged is that:

1. The District Court erred in dismissing appellant's bill of complaint, and in failing and refusing to set aside the assailed order of the Interstate Commerce Commission. (Nos. 1, 2, 4, 9, 10; R. 142-143)

2. The District Court erred in failing and refusing to hold that the order of the Commission is void and beyond its power and jurisdiction; and erred in holding that the order is lawful, valid and within the jurisdiction of the Commission. (Nos. 3, 5, 8; R. 142-143)

3. The District Court erred in holding that appellant is a common carrier and subject to the regulation of the Commission; and erred in failing and refusing to hold that appellant is not a common carrier by railroad or otherwise, and is not subject to the provisions of Section 6 or other provisions of the Interstate Commerce Act, and is not required to maintain on file with the Commission any tariff stating its charges for the service of loading or unloading carload shipments of livestock. (Nos. 6, 11, 12, 13; R. 143)

4. The District Court erred in holding that appellant is engaged in the transportation by railroad of livestock in interstate commerce, and that its loading and unloading service performed for the railroads is an interstate transportation service subject to regulation and control by the Commission. (No. 7; R. 143)

5. The District Court erred in failing and refusing to hold that the Commission and its Examiner (a) erroneously and arbitrarily refused to receive evidence proffered by appellant to show that the Commission and public stockyards throughout

the United States and the railroads serving such yards have for many years by practical construction interpreted the Interstate Commerce Act as not applicable to public stockyard companies which load and unload livestock for the railroads; (b) erroneously and arbitrarily refused to receive evidence of any character pertaining to public stockyards other than appellant's yard which was proffered by appellant; (c) erroneously and arbitrarily refused to receive evidence proffered by appellant to show that in situations analogous to the loading and unloading of livestock at appellant's stockyard the Commission has never required the persons performing such services for the railroads to file tariffs; and (d) erroneously and arbitrarily refused to permit appellant to qualify its witness to give such aforesaid evidence, to permit appellant to ask questions of its witness designed to bring out such evidence, to permit appellant to have exhibits containing such evidence marked for identification, and to permit appellant to make specific offers of proof of such evidence. (Nos. 14, 15, 16, 17; R. 143-144)

6. The District Court erred in failing and refusing to hold that the order of the Commission is void because it was made and entered without according appellant a full and fair hearing as required by Section 15(7) of the Interstate Commerce Act and the Fifth Amendment to the Constitution. (Nos. 18, 19; R. 144-145)

7. The District Court erred in finding that appellant constructed trunk lines entering Chicago,

that the only question in issue in this case is the jurisdiction of the Commission to make the assailed order, that appellant does not question the sufficiency of the evidence to support the findings of the Commission or the sufficiency of its findings to support its order, and that appellant is a common carrier within the meaning of the Interstate Commerce Act; and also erred in finding, without qualifications as to application to appellant, that the loading and unloading services performed by appellant for the railroads are interstate transportation services within the meaning of the Interstate Commerce Act and subject to regulation by the Commission. (Nos. 20, 21, 22, 23, 24, 25; R. 145)

8. The District Court erred in failing and refusing to make each and every of the findings of fact requested by appellant in its motion filed March 20, 1939, pursuant to Rule 52(b) of the Federal Rules of Civil Procedure, for amendment of findings and additional findings, and for amendment of final decree. (No. 26; R. 145-152)

9. The District Court erred in failing and refusing to make each and every of the conclusions of law requested by appellant in its motion filed March 20, 1939, pursuant to Rule 52(b) of the Federal Rules of Civil Procedure, for amendment of findings and additional findings, and for amendment of final decree. (No. 27; R. 153)

SUMMARY OF ARGUMENT

I

A public stockyard company which loads and unloads livestock at its yard as agent of the carrier or carriers serving the same is not itself a common carrier by railroad, or otherwise, and its charges for such service are therefore not subject to the jurisdiction of the Interstate Commerce Commission.

1. Pertinent provisions of the Act, their scope and purpose.

2. A public stockyard is not a common carrier within the ordinary meaning of the term.

3. The term "common carrier" as employed in the Act has not been broadened beyond its ordinary meaning by the definitions of "transportation" and "railroad" which the Act contains so as to include persons performing transportation services as agents of the railroads, but not themselves common carriers. This Court has so held.

4. The interpretation placed upon the Act by the dissenting Commissioners is fully supported by the legislative history of the statutory definitions upon which the majority relies.

5. The far-reaching effect of the Commission's decision makes it plain that Congress did not intend to make persons performing services defined as trans-

portation, as agents of a carrier, themselves common carriers.

(a) As evidenced by the great variety of situations and persons affected.

(b) By reason of the subjection not only of public stockyards companies but of many other persons to the accounting and security provisions of the Act.

6. A public stockyard loading and unloading livestock for railroads, as their agent, does not become a common carrier by reason of Section 15(5) of the Act.

II

There are no facts or circumstances which distinguish the appellant from other persons or corporations performing transportation services, as the agent of the carriers, by reason whereof the appellant is subject to the jurisdiction of the Commission, and such others are not.

1. The conjunction in ownership, operation and service between the appellant and an operating railroad company, upon which the decision of this Court in *United States* v. *Union Stock Yard*, 226 U. S. 286, rested, no longer exists.

2. The fact that appellant is authorized by its charter to operate a railroad—a fact noted by the Court in its prior opinion and referred to in the majority opinion of the Commission—does not constitute it a

common carrier as is evidenced by subsequent decisions of this Court.

3. The other factors referred to in the prior decision of this Court either no longer exist, or when disassociated from appellant's affiliation with a common carrier, are no longer of significance.

4. Mere ownership of a reversionary interest in railroad facilities does not make a non-operating owner of such interest a common carrier by railroad.

III

The setting aside of the Commission's order will not result in appellant's loading and unloading charges being unregulated. The Secretary of Agriculture, under the Packers and Stockyards Act, 1921, has full jurisdiction.

IV

The order of the Commission is null and void because of its failure to accord appellant the character of hearing required by law.

ARGUMENT

I

A PUBLIC STOCKYARD COMPANY WHICH LOADS AND UNLOADS LIVESTOCK AT ITS YARD AS AGENT OF THE CARRIER OR CARRIERS SERVING THE SAME IS NOT ITSELF A COMMON CARRIER BY RAILROAD, OR OTHERWISE, AND ITS CHARGES FOR SUCH SERVICE ARE THEREFORE NOT SUBJECT TO THE JURISDICTION OF THE INTERSTATE COMMERCE COMMISSION.

1. Pertinent provisions of the Act, their scope and purpose.

Section 1(1) of the Interstate Commerce Act (49 U. S. C.), which defines and limits its application and jurisdictional coverage, provides:

> "Section 1. Regulation in general; * * *.—(1) Carriers subject to regulation.—The provisions of this chapter shall apply to *common carriers* engaged in—
>
> "(a) The transportation of passengers or property wholly by railroad, or partly by railroad and partly by water when both are used under a common control, management, or arrangement for a continuous carriage or shipment; * * *."[1]

In this connection, it is to be noted that the District Court found as a fact (R. 118) that:

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[1]By subsequent paragraphs of Section 1(1) the Commission's jurisdiction is confined to common carriers engaged in interstate transportation, and is extended to the transportation of oil by pipe line. Part II of the Act, known as Motor Carrier Act, 1935 (49 U. S. C. §§ 301-327), extends the Commission's jurisdiction to motor carriers. None of the provisions noted is material to the issues presented by this case.

"Since May, 1922, neither plaintiff nor the Chicago Junction Railway Company has operated any railroad or transported any person or property."

Paragraph (3) of Sec. 1 provides in part:

"(3) The term 'common carrier' as used in this Act shall include all pipe-line companies; express companies; sleeping-car companies; and all persons, natural or artificial, engaged in such transportation as aforesaid *as common carriers for hire*. Wherever the word 'carrier' is used in this Act it shall be held to mean 'common carrier'."

With exceptions here immaterial, the Act thus applies only to persons and corporations which are in fact common carriers. *Pennsylvania R. R. Co.* v. *Public Utilities Commission*, 298 U. S. 170, 174.

Paragraphs (3) and (4) of Sec. 1 also provide:

"The term 'railroad' as used in this Act shall include all bridges, car floats, lighters, and ferries used by or operated in connection with any railroad, and also all the road in use by any common carrier operating a railroad, whether owned or operated under a contract, agreement, or lease, and also all switches, spurs, tracks, terminals, and terminal facilities of every kind used or necessary in the transportation of the persons or property designated herein, including all freight depots, yards, and grounds, used or necessary in the transportation or delivery of any such property. The term 'transportation' as used in this Act shall include locomotives, cars, and other vehicles, vessels, and all instrumentalities and facilities of shipment or carriage, irrespective of ownership or of any contract, express or implied, for the use thereof, and all services in connection with the receipt, delivery, elevation and transfer in transit, ventilation, refrigeration or icing, storage, and handling of property transported."

"(4) It shall be the duty of every *common carrier* subject to this Act engaged in the transportation of passengers or property to provide and furnish such transportation upon reasonable request therefor.* * *"

Sec. 6(1) provides:

"Every *common carrier* subject to the provisions of this Act shall file with the Commission created by this Act and print and keep open to public inspection schedules showing all the rates, fares, and charges for transportation between different points on its own route and between points on its own route and points on the route of any other carrier by railroad. * * * The schedules printed as aforesaid *by any such common carrier* shall plainly state the places between which property and passengers will be carried, and shall contain the classification of freight in force, *and shall also state separately all terminal charges, storage charges, icing charges, and all other charges which the Commission may require,* all privileges or facilities granted or allowed and any rules or regulations which in any wise change, affect, or determine any part or the aggregate of such aforesaid rates, fares, and charges, or the value of the service rendered to the passenger, shipper, or consignee."

The Act thus makes it the duty of every common carrier by railroad subject to its provisions to furnish the auxiliary and accessorial services included within the definition of "transportation", and to file its charges therefor, whenever a separate charge is exacted from the shipper for their performance, whether performed by the carrier itself or through an agent. The Act does not in terms subject the charges of such agent to the jurisdiction of the Commis-

sion, but only when adopted by the carrier, as charges made by it to the public, and then through its jurisdiction over the carrier.

The Act does not confer upon the Commission jurisdiction over the payments to be made by the carrier to its agent for performing services any more than it confers upon the Commission jurisdiction over any other expense incurred by the carrier in the performance of its duties. The only exception is that if the agent's services are performed in connection with transportation of property of which such agent is the owner, payments to be made therefor become subject to the jurisdiction and control of the Commission by Sec. 15(13).[3] The purpose of this provision is to prevent the payment of indirect rebates through the making of excessive allowances for services performed or facilities furnished by "the owner of property transported." The appellant is not a shipper of livestock. (R. 335, 558) Hence this Section has no application to the payments made to it by the railroads for the loading and unloading of livestock.

In addition to the requirement of Sec 1(4) that the railroads shall furnish, upon request, all services within

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[3]Sec. 15(13) provides:

"(13) If the owner of property transported under this Act directly or indirectly renders any service connected with such transportation, or furnishes any instrumentality used therein, the charge and allowance therefor shall be no more than is just and reasonable, and the Commission may, after hearing on a complaint or on its own initiative, determine what is a reasonable charge as the maximum to be paid by the carrier or carriers for the services so rendered or for the use of the instrumentality so furnished, and fix the same by appropriate order, which order shall have the same force and effect and be enforced in like manner as the orders above provided for under this section."

the definition of "transportation", Sec. 15(5) specifically requires the railroad carrier to load and unload livestock at public stockyards as a part of the transportation service to be performed by it and "without extra charge therefor to the shipper." The appellant's charges, therefore, not only are not paid by the shipper, but could not be required to be paid by the shipper, whether through the adoption thereof by the carrier or otherwise.

Except for the Packers and Stockyards Act, which subjects charges for all stockyards services, including those furnished in connection with the "receiving * * * holding, delivery, shipment, weighing, or handling in commerce of livestock," to the jurisdiction of the Secretary of Agriculture, it would appear that payments to be made to a public stockyards for the loading and unloading of livestock, as the agent of the carrier, would be solely a matter of contract between the carrier and the yards. Under the Packers and Stockyards Act, however, as we construe it, such charges would appear to be, and we think clearly are, subject to regulation by the Secretary of Agriculture, and are required to be covered by schedules filed with him by such yards.

If a public stockyards performing loading and unloading service as agent of the carriers, and other business corporations performing services within the definition of "transportation", as agents for the railroads, thereby themselves become common carriers, they are subject to the accounting provisions of Sec. 20, and may keep only such accounts as and in the form prescribed by the Commission. Likewise they may not issue securities without the approval of the Commission, as required by Sec. 20a. It is hardly conceivable that Congress so intended

Yet such is the inevitable consequence if, by reason of the definition of "transportation" contained in Sec. 1, the term "common carrier" has been broadened beyond its ordinary meaning, so as to include any person performing such service as the carrier's agent.

2. A public stockyard is not a common carrier within the ordinary meaning of the term.

The meaning of the term "common carrier" is nowhere defined in the Interstate Commerce Act, and resort must be had to the common law. *Manufacturers Ry. Co.* v. *St. L. J. M. & S. Ry. Co.*, 21 I. C. C. 304, 312. A common carrier was defined by this Court in *Washington* v. *Kuykendall*, 275 U. S. 207, where, at page 211, the Court said:

> "Within settled principles, one who undertakes for hire to transport from place to place the property of others who may choose to employ him is a common carrier."

See also *Dwight* v. *Brewster*, 1 Pick. 50, 53 (Mass.); and *Propeller Niagara* v. *Cordes*, 21 How. 7, 22.

The sole business of appellant *at this time*, whatever it may have been in the past, is that of maintaining and operating a public stockyard. (R. 241, 252-253, 576-602) A part of this stockyard service is loading and unloading livestock for railroads. (R. 241-253) Neither such maintenance and operation in general nor the loading and unloading of livestock are common carriage. The courts have so held.

In *Cotting* v. *Kansas City Stock-Yards Company*, 82 Fed. 839 (C. C. Kans.), the question before the Court was

whether or not a state statute fixing the charges for stockyard services at the Kansas City stockyard was valid. The contention was made that the state had no authority because Congress had occupied the field upon the enactment of the Interstate Commerce Act. In its opinion the Court said (pp. 842-843):

> "It is contended that Congress has taken such action in the matter of the shipment and transportation of this live stock as would prohibit the state from passing the act in controversy, and stress is laid especially upon the interstate commerce act. It will be observed that this act, by its terms, is confined to common carriers engaged in the transportation of persons and property by rail or water, or both, and includes all instrumentalities of such shipment or carriage. * * * *it cannot be said that the stock-yards company is in any sense a common carrier. The master's report shows that the company neither owns, operates, nor uses any railway motive power or rolling stock.*" (Italics ours)

The decision of the lower court in this case was reversed in this Court, *Cotting* v. *Kansas City Stock Yards Company*, 183 U. S. 79, on the ground that the Kansas statute violated the Fourteenth Amendment in that it applied only to the Kansas City yards. In the course of its opinion, however, the Court said of this stockyard, at page 85:

> "*While not a common carrier*, nor engaged in any distinctively public employment, it is doing a work in which the public has an interest, and, therefore, must be considered as subject to governmental regulation." (Italics ours)

In *Nebbia* v. *New York*, 291 U. S. 502, this Court, speaking of stockyards generally, said at page 536:

> "A stockyards corporation, 'while not a common carrier, nor engaged in any distinctively public employment, is doing a work in which the public has an interest,' and its charges may be controlled. *Cotting* v. *Kansas City Stockyards Co.*, 183 U. S. 79, 85."

Mr. Justice Van Devanter, while a circuit judge, in *Union Stockyards Co. of Omaha* v. *United States*, 169 Fed. 404 (C. C. A. 8th), where it was held that the Omaha stockyard was a common carrier engaged in interstate commerce, but only because it carried livestock for hire over its tracks, said, at page 406:

> "It must be conceded that *the stockyards company would not be a common carrier*, nor the property used by it a railroad, *if its operations were confined to maintaining the sheds or pens, to unloading shipments thereto, to loading shipments therefrom*, and to feeding, watering, caring for, and otherwise handling live stock therein." (Italics ours)[3]

In *Mann* v. *White River Log & Booming Co.*, 46 Mich. 38, 8 N. W. 550, the question involved was whether or not a booming company engaged in the business of driving and

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[3]There are also some other cases in which certain stockyard companies have been held to be common carriers, but they were actually transporting livestock by railroad, not merely loading and unloading it from railroad cars. *United States* v. *St. Joseph Stockyards Co.*, 181 Fed. 625; *United States* v. *Sioux City Stock Yards Co.*, 162 Fed. 556; aff'd, 167 Fed. 126; see also *Fesser* v. *Chicago and Illinois Midland Ry. Co.*, 193 Ill. App. 432, 267 Ill. 418, 108 N. E. 709 (National Stockyards Company, East St. Louis); and *State* v. *Union Stockyards Co. of Omaha*, 81 Neb. 67, 115 N. W. 627.

booming logs was liable as a common carrier for its failure to deliver at destination all of the logs delivered to it at point of origin. The Court held it was not subject to the common law liabilities of common carriers, saying (8 N. W. 550-551):

> "The dispute, therefore, is narrowed down to the single question whether the handling of logs, as managed by the log-driving and booming companies, is properly to be treated as common carriage. It is admitted to be like common carriage in the universality of the duty, and by statute a lien is given for charges, not only on the specific logs for charges on each, but on a part to secure the whole charges. Comp. Laws, Sec. 2788. The statute moreover gives a special remedy to enforce the lien. It also contemplates, by the section just referred to, that it is only in the absence of express contract that a uniform rate is provided for. These rights resemble in important respects the rights of common carriers. But the statute contains no declaration that the companies shall be so treated, and the whole matter is left to be determined by legal analogies.
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> * * * * * *
>
> "Taking heed to give no excessive force to resemblances, we may find, nevertheless, some other duties which are quite as analogous as carriage. Drovers—or as the common law calls them agisters—perform functions not unlike those of log drivers. Their animals move themselves, while logs are moved by the stream, and the beasts have a species of intelligence, while logs and currents move unconsciously. Yet the chief business of the men in charge of both is to prevent the property from straying or stopping, and to guide it where it belongs.

No one regards drovers as carriers. Angell on Carriers, Secs. 24, 52; Story on Bailments, Sec. 443."

The above conclusions are strongly reinforced by the relationship between services performed by appellant in loading and unloading railroad cars to the remainder of the stockyard services rendered by it. Mr. Henkle, appellant's Vice-President and General Manager, gave some graphic testimony in this connection:

"The services which the Stockyards Company performs for the railroads are essentially stockyards services or are incidental to the rendering of stockyards services. Whatever the law or the lawyers may say about the legal character of loading or unloading of livestock at public markets, it is in its nature a stockyards, not a railroad, service.

"Loading and unloading facilities must be immediately adjacent to or a part of the yards where the stock is bought or sold. Livestock is a perishable commodity, the bulk of which must be sold on the day of arrival. It shrinks if driven on foot any considerable distance and may become stale and less valuable if held over.

"Inbound shipments must be unloaded and moved out of the way promptly to prevent delay to following trains. They must reach the pens of the commission men in sufficient time to permit the animals to be sorted, fed, watered, and otherwise prepared for the market which opens early in the day. Most of the rail stock arrives between midnight and daybreak. * * * many of the alleys and pens used in this service can be and are used for other stockyards purposes. * * * the railroads could not perform this service efficiently, and the respondent could

not properly serve its non-railroad patrons if it permitted the railroads to try. Loading and unloading must be done by a personnel long trained in the handling of livestock. The stock must be driven out of the cars, across the unloading platforms, and down the chutes quickly and without injury to animals or men. This must be done in all kinds of weather and at all hours of the day.

"The work would be extremely hazardous for an inexperienced man. Much of the western stock has never been confined even in a pen before it started on its railroad journey. Many of the bulls shipped to market are powerful and vicious. Anyone who has tried to drive a single calf in his boyhood days can easily conceive of the art and experience required to handle a carload.

"Sheep are reluctant to enter a pen that has been occupied by other animals and have other idiosyncracies. Only one with long practical experience and knowledge of sheep psychology can load or unload them efficiently. Even the employees of the packers, mostly men with experience in handling sheep, sometimes have to use a trained goat to make their task easier.

"Cars of hogs, cattle, calves, and sheep are likely to be found in nearly every train and often different kinds of stock are found in the same car.

"The animals must be counted when driven out of the chute pen in the alley. The alley in front of the chute pens is one of the important ground-level thoroughfares in the yards, is nearly always in use, and there can be no delay in counting animals out of the chute pens into it without tying up traffic along the line. Most of this counting is done at night. It must be done accurately and quickly. Only an expert can count animals, particularly sheep, hogs, and calves, quickly and accurately under these con-

ditions. The counting of sheep is not done by individual animals but in small groups, and the same is true as to hogs.

"The men who handle yard stock from the chute pens must know how to handle stock in the alleys to prevent mixes, to prevent impeding other traffic, and to prevent other losses, and they must be thoroughly familiar with the location of pens, alleys, inclines, and viaducts, not only those used in this service but used in handling other yard animals.

"They must also know the location of cross-gates and be familiar with their operation to stop any run-away animals or groups of animals. They must also know the rules and regulations and practices obtaining at the yard and be able to keep the records required.

"The employees of the Stockyards Company have been trained in this work for years. The original employees handling the loading, unloading, and yarding of railroad stock at the time the yards were opened in 1865 were largely men who had been engaged in livestock production on farms and ranches. These men were succeeded by their sons and there are now many families whose third generation is engaged in doing the same work done by their grandfathers.

"Most of the men employed in loading or unloading have had long experience in other stockyards services and have learned to handle and count livestock, know the rules and regulations, and practices of the yards, know how to prepare its records, know the physical layout, and know the location of the various firms and facilities of the company. The work of loading and unloading is much the same as these other services.

"Even if the railroads could acquire the necessary personnel, respondent could not afford to allow

divided supervision of employees in the vicinity of the unloading chutes. The even and efficient flow of traffic essential to successful operation of a live-stock market would inevitably be seriously interfered with to the detriment of all the patrons of respondent." (R. 283-286)

3. The term "common carrier" as employed in the Act has not been broadened beyond its ordinary meaning by the definitions of "transportation" and "railroad" which the Act contains so as to include persons performing transportation services as agents of the railroads, but not themselves common carriers. This Court has so held.

The majority opinion is based in part upon the fact that the services performed by the appellant are among those within the definition of "transportation", which the Act contains. Although disavowed by it, the logic of the majority's contentions inevitably would lead to an interpretation of the Act whereby any person—not himself a common carrier within the ordinary meaning of the term—would become one, and as such subject to the jurisdiction of the Commision, by the performance of any service within the statutory definition of "transportation" as the agent of an interstate railroad company. In *Ellis* v. *Interstate Commerce Commission,* 237 U. S. 434, and again in *United States* v. *Interstate Commerce Commission,* 265 U. S. 292, this Court held that the effect of these definitions was not to make common carriers out of persons performing services for a railroad company and who were not themselves common carriers. These decisions are, we think, conclusive upon the point in question, and fully support the observations and contentions of the dissenting Commissioners, to which we have already referred.

Stripped of its verbiage, the reasoning of the majority of the Commission was succinctly disposed of by Mr. Justice Holmes in rendering the opinion in *Ellis* v. *Interstate Commerce Commission*, 237 U. S. 434, wherein he said (pp. 443-444):

> "The Armour Car Lines is a New Jersey corporation that owns, manufactures and maintains refrigerator, tank and box cars, and that lets these cars to the railroad or to shippers. *It also owns and operates icing stations on various lines of railway, and from these ices and re-ices the cars, when set by the railroads at the icing plant, by filling the bunkers from the top, after which the railroads remove the cars.* The railroads pay a certain rate per ton, and charge the shipper according to tariffs on file with the Commission. Finally it furnishes cars for the shipment of perishable fruits, etc., and keeps them iced, the railroads paying for the same. It has no control over motive power or over the movement of the cars that it furnishes as above, and in short, notwithstanding some argument to the contrary, is not a common carrier subject to the act. It is true that the definition of transportation in section 1 of the act includes such instrumentalities as the Armour Car Lines lets to the railroads. But the definition is a preliminary to a requirement that the carriers shall furnish them upon reasonable request, not that the owners and builders shall be regarded as carriers, contrary to the truth. *The control of the Commission over private cars, etc., is to be effected by its control over the railroads that are subject to the act.* The railroads may be made answerable for what they hire from the Armour Car Lines, if they would not be otherwise, but that does not affect the nature of the Armour Car Lines itself." (Italics ours.)

In *United States* v. *Interstate Commerce Commission*, 265 U. S. 292, 296, where the question involved was whether or not a private car company was a "carrier by railroad" within the guaranty provisions of the Transportation Act, 1920, the Court, after quoting with approval a substantial portion of the statement just quoted, said:

> "We need not review the arguments and contentions made here to the contrary. It is enough to say, that under the facts the Car Company is not a carrier by railroad, or, indeed, *a common carrier at all*, within the ordinary acceptation of the words, and there is nothing in the terms of the Transportation Act which suggests a different view." (Italics ours.)

In recognition of these decisions, the majority of the Commission disavows giving to the Act an interpretation whereby all persons performing transportation services as agents of a carrier thereby become themselves common carriers, but suggests no rule of interpretation by which some thereby become common carriers and others not. Congress either intended by the provisions in question to make all such agents common carriers or it did not. If any are, all are; and if one is not, none is. Nor it is without significance that these cases related to the particular type of agencies upon which attention was chiefly centered by the Commission in the making of its recommendation, by the committees in their reports and in the debates in Congress out of which the provisions in question grew, to wit: private car lines. (See discussion of legislative history, *post*, pp. 51-58.)

These cases also dispose of the contention, pressed below, that the appellant is a common carrier because the services which it performs are not only within the definition of transportation but are rendered through the use of facilities

owned by it within the definition of the term "railroad". As to this, the cases cited are likewise controlling. As appears from the foregoing excerpt from the *Armour Car Lines* case, that company, in addition to furnishing cars, owned and operated icing stations from which it iced and re-iced cars. These icing stations are clearly "terminal facilities * * * used or necessary in the transportation of persons or property". As such they are clearly as within the definition of the term "railroad", as are loading and unloading pens, which are nowhere specifically mentioned, but are similarly included within the definition because constituting terminal facilities.

The Commission itself has said that the purpose of the definition of "railroad" was to make it impossible for common carriers to escape their obligations to shippers or avoid the jurisdiction of the Commission on the ground that facilities embraced within the definition were furnished by a non-carrier agency. *Enterprise Transportation Co.* v. *Penn. R. R. Co.*, 12 I. C. C. 326, 335-336; *Tariffs Embracing Motor-Truck or Wagon Transfer Service*, 91 I. C. C. 539, 545-547; *Motor Bus and Motor Truck Operation*, 140 I. C. C. 685, 729.

Elevator operators perform a transportation service, as defined in the Act, through the "receipt, delivery, elevation and transfer in transit" of grain through the use of an elevator, which is a "terminal facility" used in such transportation, and embraced within the definition of "railroad." This service they perform and have performed for many years as the agents for the railroads, which pay them therefor on a basis of so much per 100 pounds. These allowances are subject to the jurisdiction of the Commission whenever such elevator operators are also shippers and

owners of the grain passing through their elevators. It has never been held that they were common carriers, and if a railroad should employ an elevator operator—who is not a grain dealer—to perform this service, there is nothing in the Act requiring that the charges exacted by him from the railroad company—which, as in the case of a public stockyard, are not paid by the shipper—become subject to the jurisdiction of the Commission any more than any other expense incurred by the carrier in the conduct of its business and which must be paid somehow out of the rate. The Commission itself has held that such an elevator operator is not a common carrier, and that it has no jurisdiction over his charges. *Keystone Elevator & Warehouse Co.* v. *Director General*, 73 I. C. C. 273, 274.

The decisions cited are determinative of the question at issue. The views of the majority are directly contrary thereto and those of the minority in harmony therewith.

4. The interpretation placed upon the Act by the dissenting Commissioners is fully supported by the legislative history of the statutory definitions upon which the majority relies.

The enlarged definitions of the terms "transportation" and "railroad," now contained in Section 1(3) and the provision [Section 15(13)] giving the Commission the power to regulate the compensation paid to "the owner of property transported," for the performance of services, or the furnishing of facilities, employed in the transportation of such property came into the Act in 1906. Together they had a common purpose, which was two-fold:

(1) To remove all doubt as to the duty of the railroads to perform the auxiliary or accessoral services embraced

in the definition of "transportation", such, for example, as refrigeration, and to subject the charges therefor, *whenever a separate charge was to be made to cover such service,* to the jurisdiction of the Commission by requiring the railroad itself to publish and file such charge with the Commission, whether performing the service itself or through an agent;[4]

(2) To prevent indirect rebating or undue preferences through payments of excessive allowances to shippers, whether to a private car line owner, who may also be a shipper, to an elevator owner transferring grain in transit, but who is customarily also a shipper of grain, or to a manufacturer or other shipper owning or furnishing any of the facilities embraced within the definition of a railroad, or who provides any of the facilities or performs any of the services embraced within the definition of "transportation", by subjecting such allowances to the control of the Commission.

That such were the purposes of the amendments is disclosed by their legislative history. They originated in recommendations made in the Commission's Annual Reports of 1904 and 1905. In these reports the Commission directed attention to abuses resulting from the system of private rebates, preferences and discriminations, and the practice of imposing additional charges upon shippers for incidental services furnished by non-carriers, especially through the

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[4]Had it been the intent of the Act to make such agent a common carrier, the Congress seemingly would have required such charges to be filed by the agent performing the service and not by the railroad company, since by Sec. 6 it is the carrier furnishing the service to the shipper which must file the charges assessed against him.

furnishing of private cars and the performance of refrigeration and icing service. In its Eighteenth Annual Report (1904) the Commission pointed out that the situation could be remedied in one of two ways: Either by requiring the railroad itself to perform such service and to subject *its* charges therefor to the jurisdiction of the Commission, whether performed by it directly or through an agent, or by subjecting the *agent itself* and its charges to the Commission's jurisdiction.[5]

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[5]The Commission said that the desired result could be accomplished by either one of two methods (pp. 17-19) thus described:

"1. By making the common carriers responsible to the public in the matter of this special equipment and this refrigeration service, if they are not now responsible.

"2. By bringing the car-line companies which provide this refrigeration for interstate shipments under the jurisdiction of the act to regulate commerce, and making their charges subject to the determination of this Commission.

"Under the first method the following points should be embraced:

"1. That the railway shall in all cases furnish the car needed for the movement of the traffic which it transports. This does not mean that the railway shall of necessity own the equipment itself, but that if it secures that equipment by lease it shall do so under conditions that the car, when provided, shall be its car. No railway should be permitted to transport the private cars of private individuals when it thereby works a discrimination against other shippers to whom it does not furnish similar cars.

"2. That the railway shall furnish refrigeration when needed. This imposes no hardship upon that company. * * * If the railway prefers to discharge this duty by contract with some private individual or corporation, it should, nevertheless, stand responsible to the public for the service rendered, to the end that

The Commission's renewal of these recommendations in its Nineteenth Annual Report (1905) was accompanied by

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it shall be performed with equality to all shippers at reasonable rates.

"3. That the railway shall publish its charges for refrigeration and maintain those charges exactly as its transportation charges are published and maintained. That the charges as so published shall be subject to the jurisdiction of the Interstate Commerce Commission, which, when it finds the charges to be unreasonable, may determine what charges are reasonable.

"4. Whenever the owner of the car is also the owner of the property transported, the compensation which the railroad company pays for the use of that car shall be subject to the jurisdiction of the Commission; and when the Commission has determined what is a reasonable compensation, no more shall be paid.

"The second method would require legislation of the following import:

"1. That all persons or companies furnishing refrigerator cars and refrigeration for interstate transportation shall be subject to the act to regulate commerce.

"2. That all refrigeration charges made by such persons or companies shall be published and adhered to, as is now provided for the publication of railway transportation charges.

"3. That the charges so made shall be subject to the control of the Interstate Commerce Commission, which shall have power to determine whether such charges are reasonable, and if found unreasonable, to prescribe the amount which shall be charged.

"4. When the owner of the commodity is also the owner of the car, the compensation for the use of the car shall be subject to the jurisdiction of the Commission."

It is readily observable that the method adopted by Congress conforms in detail as well as in principle to the first of the suggested methods and is wholly at variance with the second.

the submission of a proposed bill, in which the first and not the second of the two alternatives was followed. This bill became the foundation of the amendments referred to above.

In reporting the amendments now under review the House Committee (House Report No. 591, 59th Congress, First Session, submitted January 27, 1906) in explaining the purpose of expanding the definitions in Sec. 1 and adding the new paragraph proposed to Sec. 15 (now par. 13 set forth above), among other things stated:

> "The Act known as the Elkins Act of 1903 gave additional strength to previous legislation through its more specific prohibition relating to rebates, discriminations and preferences. Yet the ingenuity of some of the carriers and shippers had resulted in voiding the provisions of that Act through the use of joint tariffs, involving, in some instances, the railroad and a mere switch owned by a shipper, through arrangements whereby exclusive mileage was given to the shipper of products who owned his cars; through the use of refrigerator cars; through the permission given to independent corporations to render some service independent to the shipment, as the furnishing of ice in the bunkers of the cars; by what is known as the 'midnight tariff', * * * (pp. 2-3).
>
> "The first section of the Bill is substantially Section 1 of the Act of 1887, with an enlargement of the definition of the word 'railroad' and the word 'transportation'. By this enlargement it is believed, that the 'devices' resorted to by carriers, through the use of switches and cars owned by shippers and by the use of refrigerator cars, and so forth, can be obviated" (pp. 3-4).

> "* * * This section [Section 4 of the Bill, amending Section 15 of the Act] further provides that if the owner of property transported, directly or indirectly, renders any service in connection with or furnishes any instrumentality, the charges for these shall be no more than is just and reasonable, and also gives to the Commission power upon complaint to determine what is a reasonable charge, as the maximum, to be paid by the carrier or carriers for the service or the use of the instrumentality. It is believed that under this provision those exclusive charges, constituting rebates that are in some instances paid to shippers who own their own cars, may be controlled" (p. 5).

The Senate Report (No. 1242, 59th Congress, 1st Session), favorably reporting on the bill, clearly indicates the same purpose.

The legislative history of these amendments is thus wholly at variance with the contention of the majority that a public stockyard becomes a common carrier if it loads and unloads livestock as agent for the railroad company, as a service performed for the carrier and not for the shipper, and for which no charge against the shipper is imposed, merely because the services so performed are within the definition of "transportation", but is wholly in keeping with the contrary view of the minority opinions hereinbefore set forth.

We think the majority opinion of the Commission is equally at variance with other provisions of the Act.

Sec. 1(3) also provides:

> "The term 'common carrier' as used in this Act shall include all pipe-line companies; express companies; sleeping-car companies; and all persons,

natural or artificial, engaged in such transportation as aforesaid *as common carriers for hire.*"

The italicized words clearly exclude the idea that a person, not a carrier, becomes one by the performance, as the railroad's agent, of some part of the railroad's transportation duties.

Moreover, these words were added to the Act by the Transportation Act of 1920, which codified and reenacted the Act as it then existed, making certain changes therein, some of substance and others of form and arrangement. In reporting on the Transportation Act, by which this change was made, the House Committee on interstate and foreign commerce (House Report No. 456, 66th Congress, 1st Session, submitted November 10, 1919, accompanying H. R. 10453) said:

> "Section 400 amends the first five paragraphs of section 1 of the commerce act, making minor corrections and clarifying the language in several respects, but makes no important change in policy." (p. 27)

This statement that no important change in the policy of the law was intended was made after the decision in *Ellis* v. *Interstate Commerce Commission, supra,* and consequently must be read in the light of the judicial interpretation theretofore placed upon the Act. *Manhattan Properties Inc.* v. *Irving Trust Co.,* 291 U. S. 320. Furthermore, the subsequent case, *United States* v. *Interstate Commerce Commission, supra,* arose after the Transportation Act and under its provisions. In that case the Court again held that an agent performing services for a railroad subject to the Act did not itself become a common carrier. It is also

significant that in amending Sec. 1(3) Congress did not include stockyard companies in the definition of "common carrier." That would have been the normal method of extending the jurisdiction of the Commission to include such companies had Congress intended to do so.

As this Court said in *Manhattan Properties Inc.* v. *Irving Trust Co., supra,* (p. 336) after pointing out that Congress had amended an act without disturbing certain provisions thereof which had previously been judicially construed:

> "This is persuasive that the construction adopted by the courts has been acceptable to the legislative arm of the government. * * *
>
> "In this situation 'only compelling language in the statute itself would warrant the rejection of a construction so long and so generally accepted.' * * * If the rule is to be changed Congress should so declare."

Recent Congressional enactments also support our contention that Congress never intended to place under the jurisdiction of the Commission companies not actually common carriers but which merely performed for the railroads services within the statutory definition of "transportation". Section 261 of the Carriers Taxing Act of 1937 provides, in part:

> "As used in this subchapter—
>
> "(a) The term 'employer' means any carrier (as defined in subsection (1) of this section), and any company which is directly or indirectly owned or controlled by one or more such carriers or under common control therewith, and which operates any equipment or facility or performs any service (except trucking service, casual service, and the casual

operation of equipment or facilities) in connection with the transportation of passengers or property by railroad, or the receipt, delivery, elevation, transfer in transit, refrigeration or icing, storage, or handling of property transported by railroad, * * *.

* * * * * * * *

"(i) The term 'carrier' means an express company, sleeping-car company, or carrier by railroad, subject to sections 1 to 27 of Title 49."

This statute indicates quite clearly that Congress did not think that companies engaged in performing services embraced within the statutory definition of "transportation" and "carrier[s] by railroad", even though they might be controlled by or affiliated with a carrier by railroad.

The Railroad Retirement Act of 1937 (45 U. S. C. A., 1938 supp., sec. 228a) makes the same distinction between a carrier by railroad and a company performing incidental transportation services.

5. The far-reaching effect of the Commission's decision makes it plain that Congress did not intend to make persons performing services defined as transportation, as agents of a carrier, themselves common carriers.

(*a*) *As evidenced by the great variety of situations and persons affected.*

Notwithstanding the Commission's disavowal of any such intention, the logic of its reasoning would lead inescapably to the conclusion that the many persons and companies who perform transportation services for the railroads are common carriers by railroad subject to the Interstate Commerce Act. Among these services are icing of

cars (237 U. S. 434); pre-cooling of refrigerator cars for loading (232 U. S. 199); pick-up and delivery service (197 I. C. C. 675); transfer service by motor or horse-drawn vehicles (91 I. C. C. 539, 140 I. C. C. 685); wharfage service (59 I. C. C. 488, 100 I. C. C. 159, 123 I. C. C. 685, 157 I. C. C. 663); loading and unloading at terminals (59 I. C. C. 488); compression of cotton (17 I. C. C. 98); elevation of grain (34 I. C. C. 442, 73 I. C. C. 273); storage (59 I. C. C. 488, 190 I. C. C. 209); lighterage and car floatage (17 I. C. C. 40, 203 I. C. C. 481, 231 U. S. 274); unloading at shipside (23 I. C. C. 417); furnishing of privately owned cars (50 I. C. C. 652, 237 U. S. 434); drayage (100 I. C. C. 159, 123 I. C. C. 685, 177 I. C. C. 209); barge service (177 I. C. C. 209)—all of which services are held out to the shipper by the railroads in their tariffs and come within the definition of transportation in Section 1 (3) of the Interstate Commerce Act.

Congress clearly did not intend that all persons performing the services involved in these cases and others should by their performance become common carriers. Yet, under the Act, the status of any such person performing such service is the same, and no provision is made whereby some may be directly subjected to the jurisdiction of the Commission by being declared to be common carriers and others not. Had Congress intended that some should and that others should not, it would obviously have used language by which the status of each could be distinguished. It certainly could not have intended—and, as settled by the prior decisions of this Court, did not provide—that all persons performing such service should be common carriers. It therefore follows that none is made such by their performance.

That Congress did not intend that every person who performs service for the railroads should be subject to regulation by the Commission is further clearly indicated by the limited application of Section 15(13) of the Act to allowances paid to "the owner of property transported," as we have previously shown.

(b) By reason of the subjection not only of public stockyards companies but of many other persons to the accounting and security provisions of the Act.

Section 20 of the Interstate Commerce Act makes it the duty of the Commission to prescribe the forms of "all accounts, records and memoranda to be kept by carriers subject to the provisions of this Act" and makes it unlawful for such carriers to "keep any other accounts, records or memoranda than those prescribed or approved by the Commission." In *Inter-State Commerce Commission* v. *Goodrich Transit Company*, 224 U. S. 194, the Court upheld the power of the Commission to prescribe such accounts in connection with all of the business of any corporation subject to its jurisdiction, because it was, among other things, a common carrier subject to the provisions of the Act.

Section 20a forbids the issuance of securities by "a common carrier by railroad" which is subject to the Act.

If a public stockyard, loading and unloading livestock for a railroad company as its agent, and other persons performing services within the definition of transportation, thereby become common carriers, they become of necessity subject to these accounting and security provisions. No exception is made in their behalf. Obviously, Congress did not intend that every village drayman performing transfer service between railroad stations should be required to keep

his books in accordance with the accounting rules of the Commission or compelled to apply to it for authority to place a mortgage on his home.

It must be remembered that by the Transportation Act the Interstate Commerce Act—which had been many times theretofore amended—was reviewed, codified, its various provisions correlated and as such reenacted. We think it is plain that had Congress intended by the definitions in Section 1 to make stockyard companies and other persons performing transportation services common carriers, whether the remainder of their business consisted of the operation of a stockyard, a warehouse, the leasing of private cars or the conduct of a manufacturing business, it would have excluded such persons at least from these sections of the Act. The Act, therefore, discloses a consistent purpose, *viz.*, to bring within the jurisdiction of the Commission all persons who are common carriers in fact within the ordinary meaning of the term, to define with clarity the transportation duties to be performed by such carrier, to require all charges that such carrier itself makes to the public be filed with the Commission and hence subject to its jurisdiction, whether performed by the carrier itself or by an agent, and to prevent indirect rebates by bringing all allowances made by the carrier to a shipper for any transportation services furnished by him (but only when such service is connected with the transportation of his own property) subject to the jurisdiction of the Commission, but evinces no intention of broadening the term "common carrier" beyond its ordinary meaning so as to include within it all persons performing transportation services for a carrier as its agent.

6. A public stockyard loading and unloading livestock for railroads, as their agent, does not become a common carrier by reason of Section 15(5) of the Act.

At numerous places in its report the Commission stresses Section 15(5), reading as follows:

> "Transportation wholly by railroad of ordinary live stock in carload lots destined to or received at public stockyards shall include all necessary service of unloading and reloading en route, delivery at public stockyards of inbound shipments into suitable pens, and receipt and loading at such yards of outbound shipments, without extra charge therefor to the shipper, consignee or owner * * *. Nothing in this paragraph shall be construed to affect the duties and liabilities of the carriers now existing by virtue of law respecting the transportation of other than ordinary live stock, or the duty of performing service as to shipments other than those to or from public stockyards."

We have never understood the supposed significance of this Section to the question at issue. Its objects are plain, to wit, (1) to impose upon the railroad the duty to load and unload livestock at public stockyards, and (2) to prohibit the railroad from making a separate charge for such service.

In this connection it should be borne in mind that carload freight, in this country, is customarily loaded and unloaded by the shipper at his expense, and is neither included in the line haul rate nor within the duties required to be performed by the carrier. It was doubtless in recognition of this practice that Congress provided in the last sentence of this section that nothing therein should be construed to affect the duties or liabilities of the carrier in respect of

transportation of other than ordinary livestock or its obligations with respect to livestock at points other than public stockyards. See *Atchison Ry. Co.* v. *United States*, 295 U. S. 193, 198-199.

The duty thus imposed upon the carrier to load and unload ordinary livestock at public stockyards, like any other transportation duty imposed upon it by this or any other section of the Act, may be performed by the carrier itself or through an agent. If it acts through an agent, such agent does not become a common carrier although, if the railroad made a separate charge for such service, the Commission would acquire jurisdiction over such charges through the railroad. *Ellis* v. *Interstate Commerce Commission, supra.* No separate charge is imposed upon the shipper for the loading and unloading of livestock at public stockyards and under this Section none may be. The Section is wholly without significance as bearing upon the question as to whether or not a public stockyard performing such service is a common carrier.

The foregoing interpretation of this Section is borne out by its stated purpose, as declared by Senator Cummins in submitting the bill to the Senate. The Senator, co-author of the bill and Chairman of the Committee which reported it, said:

> "The reasons that have been submitted to me for the adoption of the amendment are that it has become the practice of the railroad companies, or those connected with the railroad companies, to separate their charges, and when a shipper, especially a livestock shipper, asks what the rate is from the point of origin to the point of delivery, which is a stockyard, the rate is given according to the published tariff, and then the railroad company adds to the rate a

series of charges for various services performed in connection with the transportation of the live-stock, so that the shipper does not know from time to time what it will cost him to have his stock delivered at the point to which he ships it.

"I am entirely in sympathy with the purpose of these shippers and want to bring the whole subject within the jurisdiction of the Interstate Commerce Commission and *compel the carriers to state in the published tariffs* the rate that must be paid by the shipper for the entire service of taking the property at the point of origin and delivering it to the point at which it is to leave the car. I think it is an amendment which will tend toward the protection of those who have occasion to *use the railroads* in the shipment especially of live-stock." (Cong. Rec. Vol. 59, p. 674.) (Italics ours.)

In *Allied Packers* v. *Atchison Ry. Co.*, 161 I. C. C. 641, the Commission had occasion to state the purpose of Section 15(5), and said (p. 646):

"The enactment of the paragraph in question is traceable to our decision in *Live Stock Loading and Unloading Charges*, 52 I. C. C. 209, wherein we upheld the carriers in their refusal to absorb on shipments of livestock the increases in loading and unloading charges of the public stockyards at Chicago. *The history and circumstances leading up to the legislation indicate a purpose only to prohibit the addition of these charges to the line-haul charges* on shipments of live stock to and from public stockyards. * * * The sense of the paragraph is that the services named shall be performed *at the carriers' expense without additional charge to the shipper.*" (Italics ours)

There is not the slightest indication in the text of the amendment, nor in its legislative history, that it was intended thereby to subject the charges of a public stockyards for loading and unloading service, when performed for the carrier and as its agent, to the jurisdiction of the Commission. If such had been its purpose, it would seem that Congress would have amended the definition of "common carrier" so as to include public stockyards, as it had done in respect of express companies and sleeping car companies, or would have added to Sec. 15(5) itself a clause requiring that the charges of a public stockyards performing this service for the railroads should be filed with the Commission and made subject to its jurisdiction. The purpose of the amendment was not to protect the carrier against exorbitant charges by a public stockyards, but to protect the shipper against the imposition of a separate charge by the railroads.

In passing, it may be pointed out that the duty to perform this service without the making of any separate charge therefor is the same as that which—without statutory requirement—the carriers have always observed in connection with the handling of less than carload freight loaded and unloaded at the carrier's expense. Ordinarily this loading and unloading service is performed by the carrier's own employees. But when a carrier sees fit to employ a stevedoring company to perform it, or a warehouseman both to perform the service and provide freight-house facilities, such stevedoring concern or warehouseman is clearly not a common carrier, and the charges to the railroad for the service thus performed are not required to be filed with the Commission and the Commission has no jurisdiction whatever of the payments made for such service. The ex-

pense involved might, and logically should, have an effect upon the single charge made to the shipper for receipt, loading, carrying, unloading and delivery of less than carload freight, but the Act does not confer jurisdiction over the Commission to regulate such expenses any more than it confers jurisdiction to regulate other expenses of the carrier.

A recent case in which the effect of this Section was judicially discussed is *Cincinnati Union Stock Yard Co.* v. *New York Central R. R. Co.*, 56 Oh. App. 269, 10 N. E. (2d) 456. Issues in that case were substantially similar to those in the instant case and the opinion covers many of the points already discussed.[6]

In that case, the stockyard company had sued defendant to recover increased charges for loading and unloading livestock. The trial court rendered judgment for the plaintiff. In its opinion affirming the lower court, the Court of Appeals of Ohio adopted as its own "the reasoning and analysis of the law enunciated in that opinion [the opinion of the trial judge] together with his conclusions."

In that case the trial court in its opinion thus stated the question presented:

> "The real question for the Court to determine is whether or not this Court has jurisdiction in a case involving the charges of the Cincinnati Union Stock Yard Company for loading and unloading services rendered to the defendant. The defendant claims that these charges are subject to the regulations of the Interstate Commerce Commission."

After quoting extensively from Section 1(1) and (3) of the Interstate Commerce Act, the trial judge continued:

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[6]A certified copy of this unreported opinion is reproduced in Appendix B hereto, and has been filed with the Court.

"It would appear from a reading of the above sections of the Interstate Commerce Act that it applies to common carriers engaged in performing transportation service. It would further appear that the controlling factor in deciding the Interstate Commerce Act's applicability is whether or not the person to be charged under the Interstate Commerce Act is engaged as a common carrier.

"The defendant contends that the loading and unloading of livestock from the decks of cars is an incident to common carrier transportation. Section 15(5) of the Interstate Commerce Act has considered this point."

After quoting the Section the trial judge said:

"This section has taken into consideration the question at issue in this case and places upon the railroad company or common carrier the responsibility of loading and unloading livestock. It does not designate that the common carrier must employ the services of any particular agency in the loading and unloading service but does place upon the common carrier the responsibility of seeing to it that this kind of service is done, and further places upon the carrier the duty of performing this service without extra charge to the shipper. The railroad companies are obliged, in many instances, to employ the services of persons, firms and corporations who have no connection whatever with the railroad except to perform a specific service for a consideration.

* * * * *

"The question of whether or not the Cincinnati Union Stock Yard Company is a common carrier has been before the Interstate Commerce Commission and the Courts. The case of *E. Kahn's Sons*

Company v. *B. & O. Railroad Company,* 192 I. C. C. 705, and the decision in the case under the style of *U. S. of Amer. ex rel.* v. *Interstate Com. Com.,* 73 Fed. (2d) 948, seem to prove conclusively that the Cincinnati Union Stock Yard Company is not a common carrier but as a matter of fact is a non-carrier corporation.

* * * * *

"The Court is unable to find any law preventing the railroad company or common carrier from engaging the services of whoever it may deem necessary to assist it in its duty as a common carrier."

An appeal to the Supreme Court of Ohio from the judgment of the Court of Appeals was dismissed. (132 Oh. St. 552, 9 N. E. (2d) 366) The railroad company filed a petition for certiorari in this Court, but voluntarily withdrew it, and it was accordingly dismissed. (302 U. S. 770)

II

THERE ARE NO FACTS OR CIRCUMSTANCES WHICH DISTINGUISH THE APPELLANT FROM OTHER PERSONS OR CORPORATIONS PERFORMING TRANSPORTATION SERVICES, AS THE AGENT OF THE CARRIERS, BY REASON WHEREOF THE APPELLANT IS SUBJECT TO THE JURISDICTION OF THE COMMISSION, AND SUCH OTHERS ARE NOT.

It follows from the foregoing discussion that a public stockyard which loads and unloads livestock, as agent of the railroads, is not itself a common carrier, and that there is no provision in the Act which subjects the payments made to it by such railroads for such service to the jurisdiction of the Commission. Unless, therefore, there are circumstances

peculiar to the appellant which distinguish its status from that of public stockyards generally, the order should be set aside because based upon an erroneous conception of the Commission's powers and duties. There are, however, no such circumstances peculiar to appellant as distinguished from other stockyards or other persons performing transportation services. Nevertheless, the majority of the Commission continues to point to the decision of this Court in *United States* v. *Union Stock Yard*, 226 U. S. 286, decided in 1912 on a factual basis which has since disappeared. The majority says that the appellant's charter originally authorized it to operate a railroad (although the majority of the Commission admits, and the District Court found, R. 118, that it does not do so now), and further calls attention to the fact that appellant has a reversionary interest in a railroad not now operated by it but leased and operated by a subsidiary of the New York Central. (R. 28-42) The minority finds nothing in these circumstances to distinguish appellant from any other public stockyard, or from any other person performing services within the definition of "transportation", as an agent of the carrier. (R. 43, 46-49, 57)

1. The conjunction in ownership, operation and service between the appellant and an operating railroad company, upon which the decision of this Court in *United States* v. *Union Stock Yard*, 226 U. S. 286, rested, no longer exists.

The case was instituted by the United States at the request of the Interstate Commerce Commission to enjoin the appellant, the Junction, and the New Jersey Company (which held all or practically all of the stock of the first

two companies) from paying a bonus to a shipper for the purpose of assisting it in maintaining a packing plant at the yards, and also to compel the filing of tariffs and reports with the Commission.[1]

In its decision the Court looked behind the corporate entities of appellant and the Junction and treated them as a single enterprise because of their common control, and then reached its conclusion from a consideration of their collective activities. The decision of the Court shows clearly that what we have just stated is correct. It said (pp. 304-305):

> "*Together, these companies* [*i.e.*, the Junction and appellant], as to freight which is being carried in interstate commerce, engage in transportation within the meaning of the act and perform services as a railroad when *they* take the freight delivered at the stock yards, load it upon cars and transport it for a substantial distance upon its journey in interstate commerce, under a through rate and bill furnished by the trunk line carrier, or receive it while it is still in progress in interstate commerce upon a through rate which includes the terminal services rendered *by the two companies,* and complete its delivery to the consignee. *They* are common carriers because *they* are made such by the terms of their charters, hold *themselves* out as such *and* con-

[1]At that time the Junction was operating the railroad owned by the appellant as well as other railroad properties, and was performing a terminal service within the City of Chicago. It had never recognized the jurisdiction of the Commission by filing tariffs therewith or otherwise, claiming that since it was only a switching carrier whose operations were confined wholly within a single state, it was not engaged in interstate commerce. (Brief for Appellant, 226 U. S. at 290)

stantly act in that capacity, and because *they* are so treated by the great railroad systems which use *them.*" (Italics ours.)

Again, speaking of the two companies collectively, the Court said (p. 306):

> "We think that *these companies,* because of the character of the service rendered by *them, their* joint operation and division of profits and *their* common ownership by a holding company, are to be deemed *a* railroad within the terms of the act of Congress to regulate commerce, and the services which *they* perform are included in the definition of transportation as defined in that act. It is the manifest purpose of the act to include interstate railroad carriers, and by its terms the act excludes transportation wholly within a State. In view of this purpose and so construing the act as to give it force and effect, we think the Stock Yard Company did not exempt itself from the operation of the law by leasing its railroad and equipment to the Junction Company, *for it still receives two-thirds of the profits of that company and both companies are under a common stock ownership, with its consequent control.*" (Italics ours.)

It will be observed that the Court's only reference to the Stockyard Company alone is in the last sentence of the foregoing excerpt, thus emphasizing the importance attached by it to the collective operations of these companies and to the Stockyard Company's participation in the profits arising therefrom. It is, we think, plain that the decision was based primarily upon the joint operation under common ownership of the Junction and the Stockyard Company and the consequent affiliation of the latter with a railroad en-

gaged in interstate commerce. In this the case is very similar to the earlier case of *Interstate Commerce Commission* v. *Southern Pacific Terminal Company*, 219 U. S. 498, in which the Court held that the terminal company, although lacking the customary indicia of a common carrier, because of its affiliation with an interstate transportation system of which it formed a part, could not grant a concession to a shipper.

The conditions which obtained in 1912, when the *Union Stock Yard* case was decided, no longer exist. The Junction in 1922, with the approval and authorization of the Commission (*Chicago Junction Case*, 71 I. C. C. 631, 150 I. C. C. 32), leased all its railroad properties, (including its leasehold interest in the railroad properties leased to it by appellant in 1913) to the River Road, a separately operated but wholly controlled subsidiary of the New York Central. (R. 32, 607, 631) Upon the execution of that lease the Junction cancelled its tariffs and ceased operation. (R. 32, 239, 298, 423)

The legal effect of these changes is well stated in two of the minority opinions.

Mr. Commissioner Eastman said:

> "The Yard Company, in my judgment, is not now a common carrier by railroad. Past decisions of the Supreme Court that it was such a carrier rested upon its conjunction in ownership, operation, and service with a line of railroad. Such conjunction ceased when the line of railroad was leased, practically in perpetuity, to the New York Central." (R. 43)

In his opinion Mr. Commissioner Porter said:

> "In *United States* v. *Union Stock Yard*, 226 U. S. 286, the Supreme Court held that the Yard

Company was then a common carrier subject to the Act. * * * At that time the Chicago Junction Railway was the operator as lessee of the railroad properties owned by the Yard Company. The Yard Company as a separate corporate entity was not engaged as a common carrier by railroad, but it was so closely affiliated with the railroad through ownership of the stock of both by the holding company that all three were deemed by the Supreme Court to be practically one concern. * * * Since that decision material changes have taken place. * * *

"*So that* [*i.e.*, by the lease of 1922] *the connection between the Yard Company and the operator of the railroad has been severed.* It is true the Yard Company is still affiliated with the corporation, the Chicago Junction Railway Company, *but the latter is no longer the operator of the railway.* It now occupies merely the status of a non-operating lessor company. At this time there is no affiliation through stock ownership between the Yard Company and the operator of the railroad. It can not now be said that the Yard Company and the railway operator are practically departments of the same concern. * * * The Supreme Court could not now say, as it did in the 226 U. S. 286, that 'these companies'—referring to the Yard Company and the Chicago Junction Railway Company—'because of the character of the service rendered by them, their joint operation and division of profits and their common ownership by a holding company, are to be deemed a railroad within the terms of the Act of Congress to regulate commerce, and the services which they perform are included in the definition of transportation as defined in that Act.' *In referring to the 'service rendered' by the two companies the Court obviously did not have in mind merely the loading and unloading service. It had in mind the service pre-*

viously referred to in the opinion, namely, both the loading and transporting, the Court having previously said that the Yard Company and the Chicago Junction Railway, together, as to freight which is being carried in interstate commerce, engage in transportation within the meaning of the Act and perform services as a railroad when they take the freight delivered to the stock yards, load it upon cars and transport it for a substantial distance upon its journey in interstate commerce.

"It seems obvious from the opinion that the Court could not find the Yard Company to be a 'common carrier by railroad' by reference to its service, status, and activities considered separately and apart from those of the railroad." (Italics ours.) (R. 46-48)

It is elementary that the application of a statute depends upon facts existing at a given time, not upon facts that may formerly have existed. Consequently, since the prior decision of this Court was based upon the affiliation of the appellant and the operator of a railroad, it is no longer controlling, because its factual foundation no longer exists. See *Glens Falls Co.* v. *Delaware & Hudson Co.,* 55 Fed. (2d) 971, 980; 66 Fed. (2d) 490, 491 (C. C. A. 2nd).

2. The fact that appellant is authorized by its charter to operate a railroad—a fact noted by the Court in its prior opinion and referred to in the majority opinion of the Commission—does not constitute it a common carrier as is evidenced by subsequent decisions of this Court.

Among the factors, other than those already discussed, referred to by the Court in its prior opinion, is the fact that "they" (meaning thereby both the Junction and the

Stockyard) are made common carriers "by the terms of their charters." It is obvious from the opinion that this language must be read in connection with the context and the remainder of the opinion, and that the Court did not intend to hold that, lacking the other facts then present, the Stockyard Company was a common carrier and as such subject to the jurisdiction of the Commission by reason of the fact that its charter authorized it to operate a railroad. We say this with confidence because of subsequent decisions of this Court holding that whether a corporation is a common carrier or not depends upon what it does—not upon its charter powers.

In the language of the Commission itself, this Court, in *Colorado* v. *United States*, 271 U. S. 153, held:

> "The application of the act and the jurisdiction of the Commission cannot be limited or expanded by the provisions of a carrier's charter." *Propriety of Operating Practices—New York Warehousing*, 198 I. C. C. 134, 195.

The application of the Interstate Commerce Act is limited to companies actually operating a railroad. The significant thing is what the company *does* and not what its charter derived from some state permits it to do.

In *Terminal Taxicab Co.* v. *District of Columbia*, 241 U. S. 252, 253-254, Mr. Justice Holmes, speaking for this Court, said:

> "The plaintiff is a Virginia corporation authorized by its charter, with copious verbiage, to build, buy, sell, let and operate automobiles, taxicabs, and other vehicles, and to carry passengers and goods by such vehicles; but not to exercise any of the powers of a public service corporation. It does busi-

ness in the District, and *the important thing is what it does, not what its charter says.*" (Italics ours.)

In *United States* v. *Brooklyn Terminal*, 249 U. S. 296, this Court said, at page 304:

> "We need not undertake a definition of the term 'common carrier' for all purposes. *Nor are we concerned with questions of corporate power or of duties to shippers, which frequently compel nice distinctions between public and private carriers.* We have merely to determine whether Congress, in declaring the Hours of Service Act applicable 'to any common carrier or carriers, their officers, agents, and employees, engaged in the transportation of passengers or property by railroad', made its prohibitions applicable to the Terminal and its employees engaged in the operations here involved. The answer to that question does not depend upon whether its charter declares it to be a common carrier, *nor upon whether the State of incorporation considers it such; but upon what it does. Terminal Taxicab Co.* v. *District of Columbia*, 241 U. S. 252, 254." (Italics ours.)

In one of the latest cases dealing with the subject, *United States* v. *California*, 297 U. S. 175, 181, this Court stated:

> "Whether a transportation agency is a common carrier depends not upon its corporate character or declared purposes, but upon what it does. *United States* v. *Brooklyn Terminal*, 249 U. S. 296, 304."

While appellant's charter authorizes it to operate a railroad, it does not now do so. (R. 240) The District Court so found. (R. 118)

Among the charter powers of appellant is that of eminent domain, which is referred to in the majority report of the Commission. (R. 27) This power is at most a circumstance which may be noticed in determining whether a corporation actually engaged in transporting persons or property is a common or private carrier, but this circumstance does not determine whether or not it is *in fact* a carrier. *Tap Line Cases,* 234 U. S. 1, 26; *State* v. *Public Service Commission,* 117 Wash. 453, 201 Pac. 765, 767; 51 *Corpus Juris* 5-6.

The possession of this power which appellant has covenanted to exercise only if the River Road is unable to condemn land itself (R. 667) has, under the existing circumstances, of course, no tendency to show that appellant is a common carrier by railroad. As a practical matter, the River Road could not invoke the covenant because it is an Illinois railroad corporation (R. 738A-739) and has ample power under Illinois law to condemn any property it may need. (Smith-Hurd's Ill. Rev. Stat., 1937, c. 114, sec. 18, and c. 47, sec. 2.)

The power to condemn land for public use is a privilege which the state is free to give or withhold, and it may be granted to a corporation organized to construct a railroad even though it has never operated and does not intend to operate. *Elliott on Railroads* (3rd Ed.), secs. 1185, 1186, 1194, 1195; *St. Louis Connecting R. R. Co.* v. *Blumberg,* 325 Ill. 387, 394-395, 156 N. E. 298. In Illinois such power is given to union depot companies which merely provide tracks and facilities for use by common carriers by railroad. (Smith-Hurd's Ill. Rev. Stat. 1937, c. 114, secs. 175, 178, 180.)

The covenant in the 1922 lease expressly provides that if appellant acquires additional lands by condemnation at the request of the River Road it shall convey or otherwise deliver them to the River Road. (R. 667) This negatives any intention on the part of appellant to operate any properties so acquired. *Moreover, appellant could not operate them without first obtaining a certificate of public convenience and necessity from the Commission under Section 1 (18) of the Interstate Commerce Act.*

The Junction in 1922, with the specific authorization and approval of the Commission, leased its railroad properties and those previously granted, demised and leased to it by appellant, to the River Road, a subsidiary of the New York Central. (R. 32, 607, 630, 651, 653) Appellant was a party to the lease—but was not a lessor as indicated by the Commission (R. 27)—and consented to and ratified it. (R. 677) The properties were thus leased to the River Road in the manner provided by law. Neither the lease nor the order of the Commission imposed any responsibility upon appellant for the operation of that part of the properties which appellant in 1913 had demised to the Junction in perpetuity. All the properties covered by the 1922 lease were demised to the River Road "with the right, power and authority in the River Company * * * thereon to pursue the business of a common carrier." (R. 656) In Article III the River Road was given "the right to conduct, operate and manage * * * the premises and properties by this instrument demised." (R. 660) In the same article the River Road agreed to assume and perform all legal obligations affecting or relating to the properties imposed by law on either the Junction or appellant. (R. 664)

Thus the 1922 lease, approved and authorized by the Commission, expressly contemplated the operation of the properties by the River Road as a common carrier and the performance by it of the legal obligations affecting or relating to the properties. The River Road and trunk lines which use the properties under trackage rights are the companies which are engaged in common carriage and required to file tariffs.

In *Houston Ry. Co.* v. *Anderson*, 120 Tex. 200, 36 S. W. (2d) 983, the plaintiff sought to hold a lessor railroad company responsible for mental anguish caused by the lessee company's conductor. The lessor's line had been leased pursuant to an order of the Interstate Commerce Commission, but neither the lease nor the Commission's order specifically provided for the exemption of the lessor from responsibility for the further operation of its road. The Court held that Congress had power to exempt the lessor of an interstate railroad from responsibility for performance of its obligations under a charter issued by a state, and had lawfully delegated this authority to the Commission in Section 5 of the Interstate Commerce Act. At the conclusion of its opinion the Court said (36 S. W. (2d) 984):

> "* * * where the Interstate Commerce Commission, in the exercise of the powers confided to it, has specifically authorized the owner company to lease its railroad to a particular lessee for the purposes of operation, and there is no language in the order or the lease implying a reservation of the former company's liability, the presumption should be indulged that transfer of responsibility for the performance of the charter obligations respecting matters of operation was intended by all parties con-

> cerned. * * * The very fact that the Commission approved the lease in question here strongly implies the consent of the Commission to the operation of the railroad by the Texas & New Orleans Railroad Company [lessee] upon that company's responsibility exclusively. Exemption of the plaintiff in error [lessor] from liability in matters pertaining to operation of the road sufficiently appears."

The suggestion that appellant as a lessor company is still a common carrier within contemplation of law is not in harmony either with the wording of the Act or its purpose. The question is not whether Congress has the power to regulate lessor companies to the same extent that it does operating companies, but whether Congress has in fact done so. *Cf. Pennsylvania R. R. Co.* v. *Public Utilities Commission*, 298 U. S. 170, 174, 177. This is determined by an examination of the Act. That statute shows that the only interest Congress has evinced as far as non-operating railroad companies are concerned is to require them to keep the Commission informed of their affairs by filing annual reports as provided in Section 20, and to require them to come to the Commission for authority when they want to issue securities (Sec. 20a).

3. The other factors referred to in the prior decision of this Court either no longer exist, or when disassociated from appellant's affiliation with a common carrier, are no longer of significance.

In addition to the foregoing, the Court in the prior case referred to the fact that "*they*" (meaning thereby the Junction and the Stockyard) "hold *themselves* out" as com-

mon carriers, "are so treated by the great railroad systems which use *them*", to "the character of the service rendered *by them*," and to the fact that "the services which *they* perform are included in the definition of transportation as defined in that Act." We think it is obvious—as pointed out by Mr. Commissioner Porter—that in these observations the Court was referring to the collective activities of the two companies through "their joint operation and division of profits, and their common ownership by a holding company." (R. 46-48) This is borne out by the only statement which the opinion contains in respect of the Stock Yard Company itself, in respect of which the Court said:

> "In view of this purpose and so construing the act as to give it force and effect, we think the Stock Yard Company did not exempt itself from the operation of the law by leasing its railroad and equipment to the Junction Company [*i.e.*, the 1897 lease], for it still receives two-thirds of the profits of that company and both companies are under a common stock ownership with its consequent control." (226 U. S. at 306)

If, by referring to the fact that the services performed by the two companies collectively are within the definition of "transportation" as contained in the Act, the Court meant to hold—as we think it did not—that the Stock Yard Company became subject to the jurisdiction of the Commission by reason of the fact that it loaded and unloaded livestock as the agent of the carriers, then such conclusion is inconsistent with the subsequent decisions of this Court in *Ellis* v. *Interstate Commerce Commission, supra*, and *United States* v. *Interstate Commerce Commission, supra*, and may be deemed to have been overruled thereby.

In respect of the treatment accorded to appellant by the great railroad systems which avail themselves of its service, the record shows numerous different ways in which the railroads treat the appellant differently from the way in which they treat common carriers by railroad,[2] and

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[2]Witness Heinemann pointed out that appellant is treated differently from common carriers by railroad. While individually some of these acts may not seem important, collectively they show the railroads have in fact recognized that appellant is engaged in a calling which is entirely different from their own. Summarized, these differences are:

(a) The railroads have never entered into joint through rates with appellant, except in the instance of a single carrier, which rates never became effective because the Commission would not permit it. If appellant were a common carrier, it would be the duty of the railroads under Section 1(4) of the act to establish joint through rates with appellant. (R. 393)

(b) The railroads do not deliver possession of cars of livestock to appellant as they do in the case of connecting or switching carriers. The railroads, with their own engines and crews, move trains, both loaded and empty, to and from the platforms of appellant. These trains do not come upon the property of appellant, and it exercises no control over them. (R. 240, 249, 254-255, 292-293, 599)

(c) Appellant is a large purchaser of grain and hay, which is shipped to it by rail. It is not a party to the rates on these commodities, but pays the full rate and is treated in the same manner as any commercial receiver of freight. (R. 393) It is well known that in connection with company material practically all railroad companies, by purchasing the commodity for shipment to a destination on their line and rendering some service in connection with it, pay something less than the full freight rate through the medium of divisions of through rates. *Marquette Coal Co.* v. *Pennsylvania R. R. Co.*, 40 I. C. C. 4; *Tuckerton R. R. Co.* v. *Pennsylvania R. R. Co.*, 52 I. C. C. 319.

(d) Freight bills on consignments to appellant are rendered to it by the railroads and paid in the same manner which is followed in the case of an ordinary industry, in-

neither the Commission nor our opponents have been able to point out specifically a single way in which appellant is treated by the railroads as a common carrier. Whatever may have been the treatment accorded to the appellant and the Junction, when operated together as a single enterprise, the appellant since its divorce from the operator of a rail-

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stead of by handling on interline accounts as is customary between common carriers. (R. 393)

(e) Appellant is not a party to the per diem agreement between railroads; instead it is assessed demurrage on its shipments, and treated like any other large industry. (R. 393-394)

(f) Appellant is not a member of and has never been invited to become a member of any of the railroad associations. (R. 394)

(g) Appellant is not invited to conferences with carriers respecting rates, charges, rules or regulations affecting the transportation of livestock, although it has a very great interest in such matters. (R. 394-395)

(h) Appellant's employes are not given free transportation, as is customary between railroads. (R. 395)

(i) The railroads compute all freight and other transportation charges on livestock moving to and from appellant's yards. Appellant has become a collecting agent of the railroads for inbound charges, except on shipments consigned to the packers, merely because it is more convenient to the railroads for appellant to collect these charges in connection with its own charges than it is for the railroads to do that work themselves. The charges so collected are not handled on interline accounts, as is customary between railroads, and appellant is required to put up a bond to secure their payment, a thing unheard of in the ordinary relations between railroads. In collecting the charges due it from the railroads for loading and unloading services, appellant does not deduct them from moneys which it has collected for the railroads, but renders separate bills which are paid monthly. (R. 260, 287, 395, 404-405, 544-545)

(j) Appellant does not collect undercharges on freight shipments, nor does it handle or have anything to do with overcharge claims on such shipments. (R. 409)

road has not been treated by the railroads as a common carrier in any respect. Factual foundation for this circumstance, referred to by the Court, therefore no longer exists.

As in respect of its other observations, the Court's comment that *"they"* (*i.e.*, the Stockyard Company and the

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(k) While appellant furnishes information to the railroads concerning dead and crippled animals and also furnishes weights to the railroads, the latter have their own representative, the Western Weighing & Inspection Bureau, make investigations, keep records and hold post-mortem examinations of dead animals, keep a close watch on weights furnished, make their own classification of animals and otherwise in these respects conduct themselves toward the appellant just as they would in any other case where a non-carrier agent was performing certain services for them. The Central Inspection & Weighing Bureau renders similar but less extensive services for the railroads in connection with outbound shipments to the east. (R. 399-404, 409-410)

(l) Appellant and the railroads do not use the same classification of animals. For instance, the stockyard classification of calves is based on weight, while the classification of the railroads is based on age. Appellant has never been invited to conform its classifications to those of the railroads. (R. 396-397)

(m) Neither waybills nor shipping orders are ever prepared by appellant. This work is performed by the railroads directly or through the railroads' joint agency at the Union Stock Yards. (R. 397, 594)

(n) Appellant is not called upon to quote freight rates or to handle ordinary railroad traffic matters, to validate or arrange for drovers' return transportation or similar railroad matters. This work is done either by the railroads' joint agency or individual representatives of the railroads. (R. 408-409)

(o) Appellant is not a member of the Western Weighing & Inspection Bureau, the Central Inspection & Weighing Bureau, or the joint stockyard railroad agency, and has never been invited to become such a member. (R. 365, 397, 409-410)

Junction) "hold *themselves* out" as common carriers "*and* constantly act in that capacity," like the remainder of its observations, refers on its face to their collective activities. Unless any public stockyard or any other person performing services for a railroad company, as its agent, becomes a common carrier because of their performance, then the fact

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(p) Appellant is never asked to confer with the railroads on questions of policy, nor has it ever been invited, notwithstanding its interest in livestock rates, to become a member of any of the rate committees of the railroads. (R. 397-398).

(q) Appellant has its own accounting system, which is wholly independent of the railroads' accounting systems, and is not a subscriber to the accounting rules or practices of the railroads. (R. 398)

(r) Claims for injury to or loss of stock in transit are handled by the line-haul carriers and not by appellant, although appellant may be asked to furnish the trunk lines with such information as it may possess concerning the animals involved. (R. 398)

(s) Appellant is not a member of the freight claim association of the railroads nor a party to its rules. (R. 555)

(t) Appellant is not allowed a division of freight rates, and is not a party to any tariff arrangement on transit stock; instead, the railroads pay it for its services the charges which it has on file with the Secretary of Agriculture. (R. 405-406)

(u) Appellant issues no bills of lading, and its name is not shown by the railroads on bills of lading or waybills as a participating carrier. (R. 397, 408, 410)

(v) Appellant is not asked to participate in cases involving livestock or other rates. (R. 409)

(w) Appellant is not now, nor has it ever been, a participating carrier in any of the tariffs of the railroads. Sperry's tariff I. C. C. 329 (a tariff of the railroads serving Chicago) is a directory of industries in the Chicago district, and appellant is listed therein as an industry operating a stockyard. Sperry's tariff I. C. C. 339 (also a tariff of the railroads serving Chicago) contains the charges, rules and regulations on traffic to and from points within the Chicago district. In this tariff appellant's stockyard is listed as a station on

that the appellant holds itself out to perform and performs the service of loading and unloading livestock is wholly immaterial. It holds itself out to perform all of the services embraced within the definition of stockyard services in the Packers and Stockyards Act, including the "receiving * * * holding, delivery, shipment, * * * or handling in commerce of livestock" which, of course, includes the acts of unloading and loading. (R. 252, 283-286) In so doing it is engaged in a public calling but not as a common carrier. The majority report of the Commission stresses the fact that the appellant is engaged in a public calling and holds itself out to perform the services embraced in such public calling, as does every other

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the Junction Railway, operated by the River Road. The application of this tariff makes the Chicago rates apply to and from appellant's stockyard, subject in some instances to certain "plus" charges. Tariffs of line-haul carriers provide for through rates on livestock between appellant's stockyard and all points in the United States. In no tariff is appellant listed as a concurring carrier. In every case its stockyard is indicated directly or through cross reference as a point to and from which through shipments may be moved at the established rates by the railroads concurring in said tariffs. (R. 393, 397, 440 *et seq.*, 557-558, 731-732)

The protestant railroads sought to discount the value of this testimony by cross-examination designed to bring out the fact that many switching carriers do not issue bills of lading or prepare waybills on through shipments. (R. 552-555) No one can deny that a failure to perform these particular functions is not determinative of the common-carrier status of such companies. We do state, however, that there is an impressive showing in this record that the railroads do not treat appellant as a common carrier, and that, in so far as such treatment may be important in determining the status of appellant (see *Tap Line* cases, 234 U. S. 1, 26), the facts all negative the contention that it is a common carrier.

person engaged in such a calling. But the Act does not confer jurisdiction upon the Commission of all persons engaged in a public calling but only those engaged as common carriers.

The majority opinion of the Commission also emphasizes the fact that the appellant and the railroads serving its yard are compelled to employ its services and facilities for the loading and unloading of livestock. But the fact that one is engaged in a public calling and that all resorting to the use of its facilities must employ his or its services does not make all such persons common carriers. Elevator operators, warehousemen, wharfingers and others, as well as the owners of public stockyards, are engaged in a public calling, are required to serve all comers at reasonable rates and, like common carriers, are subject to public regulation, but they are not common carriers. The source of the power to regulate all is the same and the occasion for its exercise the same, but a public stockyards is no more a common carrier than is a warehouseman.

The other factors referred to in the prior opinion, enumerated above, have either ceased to exist, or, disassociated as they now are with any affiliation or joint operation with a common carrier, are without significance on the questions at issue.

4. Mere ownership of a reversionary interest in railroad facilities does not make a non-operating owner of such interest a common carrier by railroad.

The only interest that the appellant has in any railroad is a remote reversionary interest in part of the properties now operated by the River Road, a New York Central subsidiary. The majority of the Commission, although conceding that the appellant's previous affiliation with any

company operating the railroad no longer exists, relies in part upon the existence of this reversionary interest in support of its jurisdiction. (R. 39-40)

Just how remote this interest is is shown by the facts that the indenture of December 1, 1913 between appellant and the Junction is in perpetuity, that it contains no defeasance clause, and that under the Illinois decisions the demise of the property was equivalent to a conveyance of the fee. (R. 681-689) *Chicago, Burlington and Quincy R. R. Co.* v. *Boyd*, 118 Ill. 73, 75, 7 N. E. 487; *Wiggins Ferry Co.* v. *Ohio and Mississippi Ry. Co.*, 94 Ill. 83, 93; *Huck* v. *The Chicago and Alton R. R. Co.*, 86 Ill. 352, 354-355; see also *Central R. Co. of New Jersey* v. *United States*, 229 Fed. 501, 508, 509 (C. C. A. 3d), certiorari denied, 241 U. S. 658.

Mere *ownership* of railroad facilities, however, does not make the owner a common carrier by railroad.[3] In *Escanaba & Lake Superior R. R. Co.* v. *United States*, 303 U. S. 315, the question involved was whether or not the Escanaba railroad was a carrier whose consent was required to a pooling arrangement under Section 5(1) of

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[3]To this effect: *Escanaba & Lake Superior R. R. Co.* v. *United States*, 303 U. S. 315, 321; *Detroit International Bridge Co.* v. *Tax Board*, 294 U. S. 83; *United States* v. *Interstate Commerce Commission*, 265 U. S. 292, 295-296; *Ellis* v. *Interstate Commerce Commission*, 237 U. S. 434, 443-444; *Henderson Bridge Co.* v. *Kentucky*, 166 U. S. 150; *Covington & Cincinnati Bridge Co.* v. *Kentucky*, 154 U. S. 204, 219; *Kentucky & I. Bridge Co.* v. *L. & N. R. R. Co.*, 37 Fed. 567, 617-618; *Guaranty Status of Leavenworth Terminal Ry. & Bridge Co.*, 79 I. C. C. 824; *Keokuk & Hamilton Bridge Co.* v. *Wabash Ry. Co.*, 66 I. C. C. 545, 547-548; *Wharfage, Handling, and Storage Charges*, 59 I. C. C. 488; and *Enterprise Transportation Co.* v. *P. R. R. Co.*, 12 I. C. C. 326, 335-336.

the Interstate Commerce Act. The only interest that the Escanaba had in the traffic involved was that one of the parties to the pooling arrangement transported ore over its line under a trackage agreement. This Court said at page 321:

> "Escanaba is not a carrier of the ore which is hauled [over the rails of the Escanaba] between Channing and Escanaba under the trackage agreement. It receives no part of the freight paid, it issues no bills of lading, it maintains no tariffs covering that transportation. It neither holds itself out to serve in that respect nor renders any service to shippers of ore; * * *."

The company which *operates* railroad facilities rather than the company which owns them is the common carrier. As already pointed out, it is what a company does—not what it may do at some future time—which determines whether it is a common carrier or not.

In *Henderson Bridge Co.* v. *Kentucky*, 166 U. S. 150, it was held that a corporation which owned and operated a railroad bridge across the Ohio River between Kentucky and Indiana was not engaged in interstate commerce. The Court said at pages 153 and 154:

> "That business [the operation of interstate trains over the bridge] was carried on by the persons and corporations which paid the bridge company tolls for the privilege of using the bridge."

The regulatory provisions of the Interstate Commerce Act are directed to the operating company rather than the owner of the facilities. The Act was originally passed for the purpose of uprooting discrimination and to prevent

the railroads from exacting unreasonable charges. While these purposes have been expanded by amendments to the original Act, the principal interest of Congress at all times has been that the operating companies which deal directly with the public be subject to supervision and regulation. The only requirement imposed upon lessors or owners of railroads is that they file annual reports with the commission. The section of the Act which requires the filing of such reports (Sec. 20) is not only directed to common carriers subject to the Act, but also to "the owners of all railroads engaged in interstate commerce as defined in this Act." The fact that Congress found it necessary to refer separately to the "owners of all railroads" is a clear demonstration that mere ownership or the mere existence of a reversionary interest does not bring a company within the jurisdiction of the Commission except for the limited purpose of Sec. 20.

Thus, even if it can be said that appellant is still the owner of railroad tracks which were granted, demised and leased in perpetuity, such ownership would not make it a common carrier engaged in interstate commerce; for appellant would merely be furnishing "a highway for such carriage" by the River Road and the various trunk lines which use the properties. *Covington & Cincinnati Bridge Co.* v. *Kentucky*, 154 U. S. 204, 219.[4]

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[4]The Supreme Court of Wisconsin has also held that a lessor company is not a public utility under the laws of that state. In *Chippewa Power Co.* v. *Railroad Commission*, 188 Wis. 246, 205 N. W. 900, the Court held that the lessor of a public utility plant was not a public utility, saying (205 N. W. 902):

> "The plaintiff, while the owner of the property and of the plant, has parted with its possession of the same

III

THE SETTING ASIDE OF THE COMMISSION'S ORDER WILL NOT RESULT IN APPELLANT'S LOADING AND UNLOADING CHARGES BEING UNREGULATED. THE SECRETARY OF AGRICULTURE, UNDER THE PACKERS AND STOCKYARDS ACT, 1921, HAS FULL JURISDICTION.

Appellant is a public stockyard subject to regulation under the provisions of the Packers and Stockyards Act, 1921 (R. 241) and, like other public stockyards, it is under a duty to perform essential stockyard services, including the loading and unloading of livestock, for all persons who may request it so to do, up to the limits of its capacity. (Sec. 304; 7 U. S. C. sec. 205.) Nevertheless, the majority of the Commission expressed the view that the Secretary of Agriculture would not have jurisdiction over these charges "whether or not the same is reposed in the Commission." (R. 38)

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to the lessee, under the lease. As long as the lessee performs the covenants and conditions of the lease, it is, to all intents and purposes, the owner of such plant for a period of 30 years. * * * If the plaintiff, under the facts in this case, be deemed a public utility, then the definition of a public utility has been broadened to an extent heretofore undreamed of. An owner of an office building who leases the whole or a part thereof to a public utility would thereby be embraced within the definition of a public utility, and his lease would be subjected to regulation of the Railroad Commission. The owners of patented devices leased to telephone companies would also come within the definition of the term 'public utility,' and their leases, which are purely private contracts, would be subjected to regulation by the commission. * * * A line or distinction must definitely be drawn somewhere * * *."

The Commission's conclusion that the Secretary has no jurisdiction over such charges is not well founded. The Packers and Stockyards Act, the relevant sections of which are printed in an appendix hereto, is applicable to stockyard owners engaged in the rendition of stockyard services. (Secs. 304, 305; 7 U. S. C. secs. 205, 206) In Section 301 (b) of the Act stockyard services are defined as "services or facilities furnished at a stockyard in connection with the *receiving*, buying or selling, * * * marketing, feeding, watering, *holding*, *delivery*, *shipment*, weighing, or *handling*, in commerce, of livestock." (7 U. S. C. sec. 201) Loading and unloading are essentially stockyard services, and fall within the broad term of this definition. (R. 283-286)

The Packers and Stockyards Act, however, further provides (Section 406(a)):

> "Nothing in this act shall affect the power or jurisdiction of the Interstate Commerce Commission, nor confer upon the Secretary concurrent power or jurisdiction over any matter within the power or jurisdiction of such commission." (7 U. S. C. sec. 226)

The Commission construes this provision as limiting the Secretary's jurisdiction to stockyard services other than loading and unloading in connection with rail-borne stock. (R. 40) Such an interpretation, however, does not follow from the language used; nor is it necessary in order to carry out the purposes of that portion of the Act.

It will be noted that Congress first uses language which, standing alone, gives the Secretary broad and comprehensive jurisdiction (Section 301(b)), and then takes away enough of this jurisdiction to preserve all of the existing

jurisdiction of the Commission and to prevent any interference with the functioning of the Commission that might result from the Secretary's having concurrent jurisdiction. (Section 406(a)) There is no intimation in the language that Congress intended in any way to enlarge the group of persons and corporations subject to the jurisdiction of the Commission.

If the Commission's interpretation of Section 406(a) is correct, either all stockyards performing loading and unloading services for the railroads are subject to the Interstate Commerce Act, in respect of these charges, or many of them will escape all regulation of their loading and unloading charges, because they operate no railroad facilities and have no affiliations with railroads. As we have pointed out, Congress has taken no steps to extend the jurisdiction of the Commission, and the latter result does not appear to be in harmony with the comprehensive regulation evidenced by the broad terms of the Packers and Stockyards Act.

Prior to 1920 the burden of showing that it was the railroads' duty by virtue of custom or practice to perform loading and unloading of livestock was on a complaining shipper. In that year, by the enactment of Section 15(5), Congress removed that burden and made it obligatory on trunk-line carriers to perform such services on interstate traffic at all public stockyards. *Atchison Ry. Co.* v. *United States*, 295 U. S. 193, 198-199.

The following year Congress enacted the Packers and Stockyards Act, which was designed to regulate the activities and services rendered in connection with livestock at public markets. No one can read the comprehensive language of this Act and the decision of this Court in *Stafford*

v. *Wallace*, 258 U. S. 495, upholding it and have any doubt that it was the intention of Congress that all services performed in connection with the handling of livestock at public stockyards should be subject to regulation.

We think a sounder interpretation of Section 406(a) would be that only enough is subtracted from the broad powers given the Secretary to enable the Commission to perform its functions under the Interstate Commerce Act.

It has already been pointed out in this brief that under the Congressional scheme the jurisdiction of the Commission must be exercised through control of companies which are in fact common carriers by railroad rather than by jurisdiction purely over subject matter. It follows then that the Secretary has jurisdiction over public stockyards which are not in fact "common carriers by railroad" in the rendition of loading and unloading service for the railroads. Under the Commission's interpretation, however, the loading and unloading services and charges of non-carrier stockyards would be wholly free from regulation. This would serve no conceivable purpose of Congress.

This reasoning is supported when we consider that the only possible purpose of the exception in the Packers and Stockyards Act was to preserve unimpaired the existing powers of the Commission. To give a specific illustration: Section 15(5) had been added to the Interstate Commerce Act the previous year, and undoubtedly Congress, in furtherance of its general purpose, wanted to prevent any assertion on the part of the railroads that the duty of railroads to load and unload livestock at public stockyards had been impliedly repealed by the subsequently enacted Packers and Stockyards Act. Since the purpose of Section 15(5) can be, and is, effectuated by con-

trol of the Commission over the line-haul carriers, the extension of the application of the Interstate Commerce Act to stockyards which are not common carriers was not necessary to carry out that purpose.

An harmonious construction is obtained by construing the Packers and Stockyards Act as giving the Secretary authority to regulate the charges for loading and unloading services performed by non-carrier stockyard companies which are employed by the railroads to perform this task for them. In the case of companies which are "common carriers by railroad" and also operate stockyards, such as the New York Central, which operates the Buffalo yards, and the Michigan Central, which operates the Detroit yards (R. 286, 377), Congress intended that there should be no divided jurisdiction, and it took no chance that any such carrier might escape the duties imposed by Section 15(5) by resort to the subsequently enacted Packers and Stockyards Act, 1921. As to other stockyards, a holding that the Secretary has jurisdiction over loading and unloading services furnished to, and paid for by, the railroads would in no way affect the power or jurisdiction of the Commission nor confer concurrent power upon the Secretary over any matter within the power or jurisdiction of the Commission. The provisions of Section 406(a) do not operate, therefore, to limit the jurisdiction of the Secretary over non-railroad stockyards conferred by other Sections of the Act.

This interpretation would avoid any of the so-called barter-and-trade methods of fixing loading and unloading charges referred to by the Commission. (R. 39) It would also avoid the unfounded fear of the majority of the Commission (R. 44) that the twenty-two trunk lines enter-

ing Chicago might be mulcted by appellant; for there is no presumption that one arm of the government will do any less justice to all concerned than another arm of the government.[1]

Although appellant was not permitted to make a comprehensive evidentiary showing that barter-and-trade methods of fixing loading and unloading charges have not in fact worked hardship on the railroads at various stockyards throughout the country where such methods obtain, the record does show that on Illinois intrastate shipments appellant's loading and unloading charges are not filed with the Illinois Commerce Commission but are nevertheless paid by the railroads without question. (R. 411-412) Under the Commission's construction of the Packers and Stockyards Act, 1921, appellant's loading and unloading charges on intrastate shipments would be subject to no regulation; whereas, under appellant's construction the Secretary of Agriculture would have jurisdiction of the charges on intrastate as well as interstate traffic under the doctrine of *Stafford* v. *Wallace*, 258 U. S. 495.

Commissioner Eastman, with his long and comprehensive experience in regulatory matters, said in his able dissenting opinion:

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[1]The railroads now pay to appellant charges filed by it with the Secretary of Agriculture for various services performed for them. On shipments stopped at appellant's yard by the railroads for rest, water and feeding pursuant to the Twenty-eight Hour Law (45 U. S. C. secs. 71-76) the railroads pay such charges for unloading, feeding, yardage and reloading. (R. 406-407) Appellant also furnishes and places additional bedding in livestock cars when requested by the railroads so to do, and they pay its charges for the material and service on file with the Secretary. (R. 407)

"It is by no means clear, however, even if the Yard Company is found not to be a carrier by railroad, that the charges which it makes against the railroads for the loading and unloading service will not be subject to public regulation. * * *

"Why is it that the Yard Company is in a position to insist upon loading and unloading the livestock for the railroads and therefore to enjoy a virtual monopoly of this employment? The answer to this question, I take it, lies in the fact that the Yard Company is a public stockyards and that the loading and unloading of the livestock is so intimately related to the proper conduct of that public business that it cannot well be divorced therefrom and placed under separate supervision. As I see it, therefore, although the law has made the loading and unloading of the livestock a duty of the railroads, it is a duty which must be performed, when the livestock is delivered to or received from a public stockyards, through the agency of those who are in charge of the stockyards, because it is essentially a part of the stockyards service.

"While this may seem to be an anomalous situation, it is one which need give rise to no overlapping of jurisdictions or difficulties of administration. *So far as the shippers are concerned, the loading or unloading of the livestock is a railroad service the compensation for which must ordinarily be included in the line-haul rates, and we have full jurisdiction over those rates, and also over any separate charges which the railroads may at times assess for the service. So far as the railroads are concerned, the loading or unloading is a service which must be performed for them, at a public stockyards, by those in charge of the stockyards, because it is an inextricable part of stockyards service.* It follows, therefore, that the charges made against

the railroads for such service at a public stockyards are subject to the jurisdiction of the Secretary of Agriculture under the Packers & Stockyards Act.

"From an administrative standpoint, the division of duties which would result from this construction of the law would simplify matters, in comparison with the situation which will result from the decision of the majority. Under the latter decision, the Yard Company will be partly under the jurisdiction of this Commission and partly under the jurisdiction of the Secretary of Agriculture, involving much duplication of work. On the other hand, under the construction of the law which I believe to be sound, the Yard Company would be wholly under the jurisdiction of the Secretary of Agriculture." (Italics ours.) (R. 44-45)

There is no inconsistency between the conclusion reached by Mr. Commissioner Eastman as to the power of the Secretary of Agriculture to regulate the loading and unloading charges of non-carrier stockyards and the decision of this Court in the so-called *Hygrade* case, *Atchison Ry. Co.* v. *United States,* 295 U. S. 193, referred to by the majority of the Commission (R. 38-39), and the decision of this Court in *Denver Union Stock Yard Co.* v. *United States,* 304 U. S. 470, on which the District Court to some extent relied. (R. 160)

The Commission in its report (R. 38-39) referred to the statements in the *Hygrade* case that the Interstate Commerce Act and the Packers and Stockyards Act "clearly disclose intention that jurisdiction of the Secretary shall not overlap that of the Commission," and that "The boundary is the place where transportation ends." (295 U. S. at 201) The ultimate question in that case was the

amount of charges a complaining consignee should be required to pay for the transportation of certain livestock consigned to it at appellant's stockyard. Having in mind that the *Hygrade* case involved the validity of an order of the Commission which could be effective only against common carriers by railroad, all this Court said, in the language on which the Commission relied, was that, so far as the shipper or consignee of the livestock is concerned, the boundary between the jurisdiction of the Commission and that of the Secretary is the place where transportation ends. The Court found it unnecessary to determine whether the Stockyard Company was a common carrier.

In *Ellis* v. *Interstate Commerce Commission*, 237 U. S. 434, 444, this Court said that "the only *relation* that is subject to the Commission is that between the railroads and the shippers." As Mr. Commissioner Eastman stated in the above excerpt from his dissenting opinion, the loading and unloading service, as between the railroad and the shipper, is a transportation service subject to the jurisdiction of the Commission, but, as between the railroad and the stockyard company, it is a stockyard service subject to the jurisdiction of the Secretary of Agriculture.

In *Denver Union Stock Yard Co.* v. *United States*, 304 U. S. 470, 476-477, this Court upheld the action of the Secretary of Agriculture in excluding the loading and unloading facilities of the stockyard company from the rate base in a proceeding in which the Secretary had prescribed rates for certain stockyard services. As is shown on page 473 of the opinion, the charges assessed by the stockyard company for the loading and unloading service performed by it for the railroads were not covered by the order of the Secretary. Since the Secretary had entered no order fixing rates for this loading and unloading service it follows that

this Court correctly held that the loading and unloading facilities were properly excluded from the rate base. The Court was not called upon to determine whether the stockyard company was or was not a common carrier by a railroad, and in fact made no such determination. The statements of the Court in its opinion must be read in the light of the question before it.

The fear of the majority of the Commission that the railroads will be at the mercy of the appellant in respect of the amount of loading and unloading charges that they must pay is of course no reason for reading into the Interstate Commerce Act language which is not there; but, quite aside from the legal immateriality of the fear, the fact remains that it is unfounded, even if the Secretary of Agriculture does not have any jurisdiction over such charges. Section 2 of appellant's charter provides that for the care, subsistence and handling of livestock it "may take and require to be paid, such *reasonable* charges as may be deemed just and proper." (R. 646).

Moreover, appellant is a public utility standing at an important gateway of commerce (*Stafford* v. *Wallace*, 258 U. S. 495) and is under a common law duty to charge reasonable rates. In *Covington & Cincinnati Bridge Co.* v. *Kentucky*, 154 U. S. 204, the question before the Supreme Court was whether the State of Kentucky had power to prescribe rates for the use of an interstate bridge. In holding that Congress alone had power to regulate such charges, the Court said (p. 222):

> "We do not wish to be understood as saying that, in the absence of Congressional legislation or mutual legislation of the two States, the company has the

> right to fix tolls at its own discretion. There is always an implied understanding with reference to these structures that the charges shall be reasonable, and the question of reasonableness must be settled as other questions of a judicial nature are settled, by the evidence in the particular case."

It is well settled that one who provides facilities or service used by the public at gateways or on highways of interstate commerce may exact only a reasonable charge. See with respect to wharfage: *Packet Co.* v. *St. Louis*, 100 U. S. 423; *Vicksburg* v. *Tobin*, 100 U. S. 430; *Packet Co.* v. *Catlettsburg*, 105 U. S. 559; *Transportation Co.* v. *Parkersburg*, 107 U. S. 691, 699; with respect to ferry service: *Gloucester Ferry Co.* v. *Pennsylvania*, 114 U. S. 196, 217; with respect to the use of highways: *Kane* v. *New Jersey*, 242 U. S. 160; *Interstate Busses Corp.* v. *Blodgett*, 276 U. S. 245; *Interstate Transit, Inc.* v. *Lindsley*, 283 U. S. 183; and with respect to stockyards: *Cotting* v. *Kansas City Stock Yards Co.*, 82 Fed. 839, 843.

It follows, therefore, that the fear of the majority of the Commission that the appellant will exact exorbitant compensation from the trunk-line railroads for loading and unloading their livestock, and that "barter and trade" methods will prevail unless it assumes jurisdiction over appellant has no sound basis.

IV

THE ORDER OF THE COMMISSION IS NULL AND VOID BECAUSE OF ITS FAILURE TO ACCORD APPELLANT THE CHARACTER OF HEARING REQUIRED BY LAW.

The proceeding before the Commission was held under the provisions of Section 15(7) of the Interstate Com-

merce Act, which authorizes the Commission to enter an order "after full hearing." The requirement of a full hearing is thus a condition precedent to the power of the Commission to act. *Morgan* v. *United States,* 304 U. S. 1, 14-15.[1]

Two hearings were held by the Commission, one in Washington before a member of the Commission and an Examiner, and the other at Chicago before an Examiner. It is the hearing held at Chicago of which appellant particularly complains.[2] At that hearing appellant attempted to show that the practical construction of the Interstate Commerce Act over the years by the Commission, the railroads and the stockyards had been that it was not applicable to stockyards performing loading and unloading for railroads, even where the conditions were similar to those now obtaining at Chicago. It also sought to prove material facts concerning other yards in rebuttal of evidence put in the record by the Commission and other parties to the pro-

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[1]The due process of law clause of the Fifth Amendment to the Constitution also requires that an administrative body must accord a fair hearing before it enters an order depriving any person of liberty or property. *Oregon Railroad & Navigation Co.* v. *Fairchild,* 224 U. S. 510, 524; *Interstate Commerce Commission* v. *L. & N. R. R. Co.,* 227 U. S. 88, 91; *Southern Ry. Co.* v. *Virginia,* 290 U. S. 190; *Railroad Commission* v. *Pacific Gas & Electric Co.,* 302 U. S. 388, 393. This Court will probably not find it necessary to go beyond the statute to consider the requirements of the Fifth Amendment because the statute requires a "full hearing." *Cf. Morgan* v. *United States,* 298 U. S. 468, 477-478.

[2]The Commissioner presiding at the first hearing indicated that he would rule in the same manner as the Examiner later ruled at the second hearing, but the occasion did not arise for a specific ruling at that hearing except in connection with the proffer of evidence not of great consequence. (R. 272-273)

ceeding, and in support of its affirmative case. This evidence was detailed and comprehensive. It was objected to only on the ground it was immaterial and irrelevant. (R. 515-517) The Examiner, however, refused, arbitrarily we think, to allow appellant—

> (1) To present any evidence concerning the situation at any stockyard other than Chicago or any facts pertaining to such other stockyards, regardless of the character of the evidence or the reasons advanced for producing it;[3]
>
> (2) To make its record for review by offers of proof of specific facts, either oral or documentary, in the case of such rejected evidence, or to develop the evidence it so sought to prove by means of questions directed to the witness; or
>
> (3) Even to have the reporter mark for identification or to offer exhibits the Examiner conceived to be irrelevant or immaterial.

The rulings of the Examiner were not mere errors of judgment which arose during the heat of argument at the hearing. There was nothing casual about them. They were made as a result of a premeditated policy, announced when the occasion first arose, before argument, and consistently adhered to throughout the hearing. Appellant's witness was not even allowed to state his qualifications to

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[3]The scope of the Examiner's ruling is clearly indicated by his statement: "* * * that no matter what the conditions at other stockyards may be, those conditions cannot have any bearing upon or any effect upon the Commission's determination of the status of the Union Stock Yard and Transit Company." (R. 541)

testify to matters considered immaterial by the Examiner. The Examiner enforced these rulings rigidly at all times. His action was deliberate and calculated, and wholly improper.[4]

In a petition for further hearing before final submission appellant asked the Commission to overrule its Examiner and direct him to receive the evidence which he had rejected, or, in any event, to allow appellant to make specific offers of proof. (R. 164-199) The Commission denied this petition. (R. 199)

There are few principles in our law that are more firmly established than that the practical construction of a written document whose meaning is doubtful, be it a contract, a statute, or even the Constitution itself, will be given weight by the courts in determining its meaning. *Louisville & Nashville R. R. Co.* v. *United States,* 282 U. S. 740, 757; *Boston & Maine Railroad* v. *Hooker,* 233 U. S. 97, 118; *The Pocket Veto Case,* 279 U. S. 655, 688, 689; *American Asphalt Roof Corporation* v. *Atchison Ry. Co.,* 156 I. C. C. 147, 155.

The practical construction of a statute is of value not only where the administrative body charged with its enforcement acts under it, but also where over a period of time it fails to take action. In *Davis* v. *Manry,* 266 U. S. 401, 404-405; *Pennell* v. *P. & R. Ry. Co.,* 231 U. S. 675, 680; see also *United States* v. *C. St. P. M. & O. Ry.,* 43 Fed. (2d) 300, 305-306 (C. C. A. 8th).

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[4]The details which support the statements made in this and the preceding paragraph are found on the following pages of the Record: 280-281, 374-377, 380-382, 384-391, 420-421, 435-436, 439, 450-451, 484-485, 505, 507-517, 537-538, 548-550, 564.

Appellant proposed to show: (1) pertinent facts relative to the practice of the Commission over a period of many years in administering and construing the law with respect to stockyards throughout the country, where conditions are similar to those now existing at Chicago, which evidence would have included certified copies of records from the files and proceedings of the Commission itself showing the status and character of the companies operating such other stockyards, as well as other pertinent data, both documentary and oral, gathered as the result of a special study and investigation made by a witness exceptionally well qualified both as to experience and study to testify to such matters; (2) that there are approximately 135 other public stockyards in the United States under regulation by the Secretary of Agriculture, all of which perform loading and unloading services and are paid therefor by the railroads; (3) that the facilities and services of these other yards are not only similar to those at Chicago, but also that in many instances affiliations exist with the railroads serving such terminals; (4) that nearly all of the other public yards are the sole terminals for the handling of livestock in the respective cities where they are located, and that the comments made by the Commission in its report in I. & S. 4109 (the 1935 case) with respect to a practical monopoly apply with like force at such other points; and (5) that no one of the other yards is required by the Commission to file tariffs with it covering loading and unloading services performed for the railroads. (R. 164-199)

Appellant also offered to show that this situation has existed for years; that the Commission has known about it; and that the Commission, although it is charged with the duty of seeing that the Interstate Commerce Act is enforced

(Sec. 12), has never required any of these other yards to submit to its jurisdiction. (R. 178)

Appellant is not a common carrier. The Commission, however, conceives that certain portions of the Act bring appellant within its purview. The involved reasoning whereby the Commission reached such a conclusion in 1935 (I. & S. 4109) indicates quite clearly that it regards the meaning of the statute as not free from doubt. (R. 28-42) The fact that there were dissenting opinions in the present case also carries the same implication. See *Merchants Warehouse Co.* v. *United States*, 283 U. S. 501, 513-514. A copy of the Commission's report in the case decided in 1935 was introduced in evidence by the presiding Commissioner at the hearing in Washington. (R. 228) In these circumstances, appellant had the right to show that the Commission has, in practice, construed the Act as not applying to other stockyards where conditions are similar to those now existing at Chicago. See *Pennell* v. *P. & R. Ry. Co.*, 231 U. S. 675, 679.

There are other reasons why the Examiner should not have rigidly excluded all evidence concerning other stockyards. A full and fair hearing requires that a party be given an opportunity "to offer evidence in explanation or rebuttal," *Interstate Commerce Commission* v. *L. & N. R. R. Co.*, 227 U. S. 88, 93, as well as evidence showing the propriety of "the step asked to be taken." *The New England Divisions Case*, 261 U. S. 184, 200. To this end appellant should have been permitted to show facts concerning other stockyards of the character and for the reasons following:

1. In its report in I. & S. 4109, *Livestock Loaded and Unloaded at Chicago*, 213 I. C. C. 330 (the Commission's

own exhibit) the Commission advanced as a reason why the Interstate Commerce Act should be construed to apply to appellant the danger that the remedial purposes of Section 15(5) might not be fully accomplished if the railroads were left to barter-and-trade methods in procuring loading and unloading services necessary to complete the transportation of livestock to and from public markets, and that such charges, if unregulated, might result in higher rates to shippers. (R. 38)

Appellant was prepared to show the incorrectness of the Commission's premise by proving that even though the railroads employ the services of stockyard companies (all unregulated by the Commission except appellant) in loading and unloading livestock at all of the public yards of the country, there have been no substantial controversies over these charges except in two or three instances; that some yards publish their charges for such services in their tariffs on file with the Secretary of Agriculture; and that at other yards where so-called barter-and-trade methods obtain the railroads have been able to agree with the stockyard companies on the matter of charges without hardship to the railroads and without increasing their line-haul rates.[5] (R. 168) Appellant was also prepared to show by detailed evidence, both oral and documentary, that the facts and circumstances at other yards are not essentially different from those obtaining at Chicago. (R. 168-169)

The Interstate Commerce Act must be construed as one of general application. No part of it can be considered

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[5]An offer of proof respecting some of this evidence, in language no more specific than the foregoing, brought forth the following comment from the Examiner: "* * * I want to state here these offers giving the details of the testimony are not going to be accepted." (R. 388-339)

as applying only to Chicago. The best proof, therefore, on the question of whether the remedial provisions of Section 15(5) can be carried out without regulation of stockyards by the Commission is the nation-wide experience of the railroads in the absence of such regulation. Nevertheless, the Examiner refused to allow appellant to introduce any such evidence.

2. Certain evidence concerning other yards was admissible on still another ground. In its report in I. & S. 4109 (the Commission's own exhibit) the Commission said:

> "It has been urged that the Secretary of Agriculture would have jurisdiction over the charge. We are of the view that he would not have such jurisdiction whether or not the same is reposed in the Commission." (R. 38)

As tending to show that the Secretary, who is the administrative officer charged with the duty of carrying out the provisions of the Packers and Stockyards Act, 1921, had for many years agreed with its construction of that Act, appellant should have been permitted to show that at many yards, under conditions similar to those obtaining at Chicago, the loading and unloading charges are included in tariffs on file with the Secretary, and that these charges are paid without question by the railroads, including those roads protesting in the proceeding before the Commission. (R. 169-170)

Moreover, in the present case, appellant is not seeking to escape all regulation, but is merely asserting its legal right not to be kept in the difficult position of trying to obey two masters. As evidence of its good faith, its Vice-President stated under oath that appellant, if held not to

be a common carrier by the Commission, would publish its loading and unloading charges in its tariffs filed with the Secretary of Agriculture. (R. 327) In order to show that this offer would not have been futile, appellant should have been allowed to prove that the Secretary permits other stockyards so to publish their loading and unloading charges with him. (R. 170)

3. The Commission's own exhibit contained the dissenting opinion of Mr. Commissioner Meyer in I. & S. 4109. Four Commissioners did not participate in that decision. (R. 42) The Examiner had no right to presume that in this proceeding the four non-participating Commissioners or other Commissioners could not have been persuaded on brief or oral argument that the views of Mr. Commissioner Meyer were sound. In order that it could make such an argument, appellant was entitled to lay a factual basis for it. The Examiner, therefore, should have permitted appellant to show that the situation at Chicago is not essentially different from the situation at other stockyards, and to show that the principles announced in the *Kansas City* case cited by the dissenting Commissioner (R. 57) are basically as sound today as when announced.[6] Obviously, this could not be adequately done by confining the evidence to facts pertaining only to Chicago. The Examiner should also have allowed appellant to show that railroads in many instances employ non-carrier companies or individuals other than stockyards to perform transpor-

[6]The Examiner would not even let the witness state his qualifications to discuss this subject in so far as it related to other yards. (R. 387-388)

tation services for them without subjecting such parties to regulation. (R. 185, 470, 567-568)

4. A copy of the report of the Commission in *Live Stock Loading and Unloading Charges,* 61 I. C. C. 223, was incorporated by reference in the record by stipulation of the parties at the instance of the protestant carriers and without limitation as to use. (R. 249) It thereupon became a part of his evidence in the case. *Kansas City Southern Ry. v. Albers Commission Co.,* 223 U. S. 573, 596.

Speaking of the loading and unloading services at western stockyards in the exhibit so introduced in evidence, the Commission said:

> "Except for variations in the size of the properties and in the volume of traffic, the arrangement of facilities and the character of operations in the particular service are much the same at the several yards." (R. 641)

The exhibit having been admitted in evidence, and counsel for the railroad protestants having indicated that he might use any report for any purpose (R. 289), appellant clearly had the right to submit evidence to explain the statement above quoted, bring it up to date or otherwise amplify it.

5. The protestant railroads introduced an exhibit showing rail receipts at the Chicago yards on the theory that "it is quite important to show that this Union Stock Yards Company stands over at the neck of the bottle and unloads more than 100,000 cars a year and says nobody can come on the place to do it * * *." (R. 342, 733-735) The Examiner also stated that he wanted this information. (R. 343)

In its decision in I. & S. 4109, introduced as an exhibit, the Commission attached great importance to the fact that most of the livestock at Chicago is handled through appellant's yards and to the further fact that appellant insists on performing the loading and unloading services. (R. 36)

Appellant was prepared to show that protestants and the Commission itself attached too much importance to the facts mentioned, and that no reason peculiar to appellant's yard in Chicago warrants its being set apart for regulation by the Commission. (R. 173) A partial showing was made by testimony to the effect that the livestock business is such that a large volume of livestock can be handled only at a terminal market (R. 416), and that livestock must be loaded and unloaded by experienced livestock handlers familiar with stockyard property, regulations and practices. (R. 284-286)

Appellant should have been permitted to complete this proof by showing that under conditions similar to those obtaining at Chicago (1) at practically all livestock markets one stockyard company, served by all trunk-line railroads, handles the bulk of the business; (2) at all public markets stockyard employes perform the services of loading and unloading rail-borne livestock; (3) all stockyard companies have always insisted on doing this work because there would be endless confusion, slowing up of operations and inefficiency if the stockyard companies did not perform the loading and unloading services; and (4) such companies have always held themselves out to perform these services. (R. 173-174) Appellant was also prepared to show that "bottle neck" conditions relatively similar to those obtaining in Chicago obtain at practically all of the public stockyards. (R. 174) See *Stafford* v. *Wallace*, 258 U. S. 495.

No technical objections were raised as to the character of this evidence, the only objection being as to the materiality and relevancy. (R. 515-517) The Examiner, however, excluded it under his blanket ruling, and adhered to this ruling notwithstanding the fact that its relevancy and materiality were pointed out to him from time to time by counsel for appellant. (R. 508-510, 517-537, 541) The Examiner's refusal to admit this evidence was erroneous, and his conduct in that respect, we believe, arbitrary and unreasonable.

Not only did the Examiner exclude evidence concerning other stockyards, but he pursued his rigid policy much further. He would not permit appellant's witness to testify (or even to qualify to testify) as to analogous situations, such as the handling of cotton by independent companies for railroads at transit points, the handling of commodities by lighterage companies or by dock companies for railroads at ship-side (R. 567-568), or pick-up and delivery services performed by truckers for the railroads. (R. 470)

The Examiner, however, did not stop with refusing to permit appellant to prove material facts concerning other yards; he even refused to permit it to have marked for identification or to offer exhibits containing facts that he considered immaterial or to make offers to prove specific facts.[7] This was done deliberately and consistently through-

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[7]The Examiner, it is true, did offer to permit counsel for appellant to make "general observations" concerning and "state generally" what appellant proposed to prove (R. 381), but forbade the making of offers of proof of specific facts. (See, *e.g.*, R. 381, 538, 549) He stated that he would permit counsel to read "the title of the exhibits you have that you desire to offer in this connection" (R. 511), but refused to allow appellant to have the exhibits marked or to offer them in evidence. (See, *e.g.*, R. 538, 549) The Commission in its

out the hearing.[8] (R. 374-376, 380-381, 388-389, 507-508, 511, 538, 549-550, 564-569)

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report attempts to excuse the Examiner on the ground that the general character of the rejected evidence appears in the record. (R. 26) The right to make specific offers of proof of rejected evidence, including the right to have exhibits containing such evidence marked for identification and offered, is uniformly recognized. *Chicago & Alton R.R. Co.* v. *Fietsam*, 123 Ill. 518, 522, 15 N. E. 169; *Maxwell* v. *Habel*, 92 Ill. App. 510, 512; *Fidelity & Casualty Co.* v. *Weise*, 80 Ill. App. 499, 513; *Sellers* v. *State*, 7 Ala. App. 78, 61 Sou. 485, 488; *Spurlock* v. *State*, 17 Ala. App. 109, 82 Sou. 557, 558; compare *Herencia* v. *Guzman*, 219 U. S. 44, 46; and *Packet Co.* v. *Clough*, 20 Wall. 528, 542-543. General offers of proof are not sufficient; they must be specific. *Central Pacific R.R.* v. *California*, 162 U. S. 91, 117; *Goodrich* v. *City of Chicago*, 218 Ill. 18, 23, 75 N. E. 805; *Elliott's General Practice*, 714; 64 *Corpus Juris*, 127-129. This Court has held that the Commission is required in proceedings conducted by it "to preserve the essential rules of evidence by which rights are asserted or defended." *Interstate Commerce Commission* v. *L. & N. R.R. Co.*, 227 U. S. 88, 93. The right to make offers of proof of evidence, both oral and documentary—whether viewed as a rule of evidence or a rule of procedure—is a fundamental rule by which a litigant asserts and defends his rights, and is an essential part of a fair hearing.

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[8]The scope of the Examiner's rulings is shown by the following portions of the record:

Record 538:

"Mr. Gladson: And, Mr. Examiner, do I correctly understand you that your ruling is that you won't permit any evidence pertaining to facts and circumstances at these other stockyards, these other posted stockyards?

"Examiner Carter: Yes, sir.

"Mr. Gladson: And am I correct also in my understanding that you won't permit us to mark any exhibits pertaining to these other yards for identification?

"Examiner Carter: That is correct.

Whether the Examiner was laboring under the mistaken impression that exhibits merely marked for identification

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"Mr. Gladson: Or that I won't be permitted to put questions to this witness concerning the facts and circumstances of these other yards and offer specific proof concerning such facts?

"Examiner Carter: That is true."

Record 549:

"Mr. Gladson: * * * I want to make my record as to what I want to prove so that when the commission or the courts get it they will know specifically what I expected to prove by this witness. * * *

"Examiner Carter: I am not going to permit the detailed offer of testimony which I have ruled is inadmissible.

"Mr. Gladson: And that includes—you are not going to permit, as I understand it, the marking of these specific exhibits and offering them in evidence. Am I correct in that understanding?

"Examiner Carter: Yes, I think you are—that is my ruling.

"Mr. Gladson: And as far as the specific evidence which this witness is going to make orally in connection with these various stockyards, am I correct in my understanding that the Examiner will not permit that evidence to be developed * * * in question and answer form?

"Examiner Carter: That is correct."

With reference to certain pages of an exhibit for identification which contained railroad tariffs showing rates to markets other than Chicago, the following colloquy is enlightening (R. 566):

"Mr. Gladson: * * * You don't mean by that, Mr. Examiner, that they will be physically removed from the file and be destroyed, or something of that sort?

"Examiner Carter: They will be physically removed from that exhibit and a notation made of what was physically removed.

"Mr. Smith: That is exactly what ought to be done with them. They ought to be taken out and thrown in the fire, if the Examiner please. * * *"

or offers of proof might somehow be treated as evidence without being admitted as evidence,[9] whether he felt bound to follow a similar ruling made as to an offer of proof by the Commissioner who presided at the first hearing[10] (R. 272-273), or whether something else prompted him to take such action, does not appear in the record. But whatever may have been the reason, the effect was the same: to deny

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[9]There are indications that the Examiner may have labored under this mistake. (R. 435-436) See *Byerley* v. *Sun Co.*, 181 Fed. 138, 142-143, wherein the Court pointed out the fallacy of any such theory. See also *United States* v. *Abilene & Southern Ry. Co.*, 265 U. S. 274, 288; *Shelton* v. *Holzwasser*, 91 N. Y. S. 328, 329; and *Casteel* v. *Millison*, 41 Ill. App. 61, 65-66.

[10]Apropos of the discussion at the first hearing on this subject the statement of the Court in *City Railways Company* v. *Carroll*, 206 Ill. 318, 328-329, 68 N. E. 1087, is enlightening:

> "No witness was put upon the stand; no question was asked. Nothing was done except a mere conversation or talk had between counsel for appellant and the court. Such procedure as that does not amount to an offer of evidence, and the remarks of the court did not amount to a refusal to admit evidence. There can be no refusal to admit that which has not been offered, and counsel cannot, by engaging in a mere conversation with the court, although it may relate to the procedure, by merely stating what he desires to do, get a ruling from the court upon which he can predicate error. If appellant desired to make the contention it now makes, it should have at least put a witness upon the stand and proceeded far enough that the question relative to the point it is now said it was desired to offer evidence upon was reached, and then put the question and allow the court to rule upon it, and then offer what was expected to be proved by the witness, if he was not allowed to answer the question asked."

to appellant a full opportunity to have the Examiner's rulings reviewed by the Commission[11] or the District Court.[12]

The Examiner, however, allowed protestants and himself the widest latitude in going into the purposes and motives of appellant. (R. 307 *et seq.*) This was carried even so far as to inquiring whether appellant was sponsoring certain proposed legislation in Congress (R. 314); what brought about the investigation in a valuation proceeding concerning appellant's stockyard then pending before the Secretary of Agriculture (R. 330); whether the Secretary had fixed the rates of appellant (R. 318-319); and whether appellant had been successful from its inception with practically no regulation by the Secretary of Agriculture. (R.

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[11]In its petition for further hearing before final submission appellant was unable to set forth specifically the evidence which it wished to adduce and which the Examiner had refused to receive for the reason that Rule XV(b) of the rules of practice of the Commission requires that in such a petition "the *nature and purpose* of the evidence to be adduced *must be briefly stated.*" (See R. 737 and *National Wholesale Grocers' Assn.* v. *Director General,* 69 I. C. C. 669, 675.)

In its petition appellant, after referring to this rule, stated that it was prepared, if the Commission desired, to submit the exhibits which the Examiner had refused to permit to be marked for identification and a detailed statement of the evidence which it would have offered if it had been permitted by the Examiner so to do; but the Commission denied the petition without allowing appellant an opportunity to submit the exhibits or statement. (R. 198-199)

[12]The Examiner must have understood that this would be the effect of his rulings because counsel for protestants, in objecting to appellant's making specific offers of proof and discussing what happened at the first hearing, said: "* * * and the Commissioner has ruled that the Commission would not hear these detailed offers of proof that were simply designed to get into the record in another way a record which they desired to take to court." (R. 386)

315-319) He permitted the railroad protestants to introduce as an exhibit a small section of the cross-examination of the government witness by appellant's counsel on rate of return in the valuation proceeding before the Secretary of Agriculture[13] (R. 320-321, 729-730); a reply to a protest filed in another case to which reply appellant was not even a party (R. 321-322); and a draft of a proposed contract for additional compensation submitted by appellant to the railroads several years ago but never executed. (R. 307-308, 561-562)

The Examiner himself elicited information that one of the purposes of appellant in seeking to withdraw its tariffs was to increase its charges (R. 311); inquired about increases in yardage and other charges (R. 360); and allowed protestants to go into the question of increases in rates for ordinary stockyard services (R. 330-331); yet when appellant sought to explain this testimony by showing the recent

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[13]The purpose of this exhibit apparently was to bind appellant by the implications of questions put by its counsel in cross-examining a witness in another case. (R. 315-316) The admission of the exhibit was strikingly improper for several reasons: (1) any evidence concerning regulation of appellant by the Secretary of Agriculture (except evidence with respect to the regulation of loading and unloading charges, which the Examiner rejected) was immaterial to the issues in the case; (2) whether appellant had been successful with or without regulation by the Secretary was likewise immaterial; (3) whether regulation by the Secretary had been efficient was a matter primarily with which Congress should be concerned; and (4) it would work untold hardship on the litigants for any tribunal to establish as a principle that they are bound by the implications of questions put by their counsel. This is particularly true in connection with cross-examination where counsel is given much latitude in both the form and substance of questions in testing the knowledge or conclusions of witnesses.

decline in its revenue and its need for more income, the Examiner sustained an objection to such evidence when appellant refused to accept a condition imposed by the Examiner that it furnish information concerning the measure of appellant's yardage rates more than 20 years ago, which information the Examiner had previously held to be immaterial. (R. 428-430, 331-332) The Examiner also declined to permit appellant to show the proportions of revenue derived from loading and unloading charges and from ordinary stockyard services except on the same condition. (R. 336-337)

That the rejected evidence may have affected the result is evidenced by the concurring report of Commissioner Aitchison, in which he said:

> "Accepting the ruling on evidence to be the law of the case, as it has been passed upon by the Commission, I concur in the result. However, I believe the objection to the testimony offered should have been overruled, as it appears to me to be relevant and material. What the decision would be with the proffered evidence before us can not now be determined."[14] (R. 42)

The refusal to receive the evidence which we have been discussing was so fundamental as to justify the setting aside of the order of the Commission if this Court finds itself unable to say on the present record that appellant is beyond the purview of the Interstate Commerce Act. As this Court said in *Morgan* v. *United States*, 298 U. S. 468, 480, in discussing the "full hearing" required by the Packers and Stockyards Act:

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[14]Commissioner Eastman was also of the opinion that the rejected evidence should have been admitted. (R. 45)

"Facts and circumstances which ought to be considered must not be excluded."

CONCLUSION

The reasoning by which the Commission reached the conclusion, upheld by the District Court, that a public stockyard company which does not carry persons or property from place to place, and does not possess or operate the locomotives, cars, tracks and other necessary facilities for carriage, is nevertheless a common carrier by railroad because it loads and unloads a particular class of freight as an agent for trunk-line railroads is unsound and unwarranted by the language of the Interstate Commerce Act. The hearing in the proceeding in which the order was entered was contrary to established principles embodied in the "full hearing" required by the Act as well as by the Constitution. The decree of the District Court, which dismissed appellant's bill of complaint, should be reversed, and the case remanded to the District Court with directions to set aside the order and enjoin its enforcement and operation.

Respectfully submitted,

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APPENDIX A

Statutes Involved

Title 49 U. S. C. Interstate Commerce Act provides

"Section 1. Regulation in general; * * *.—(1) Carriers subject to regulation.—The provisions of this chapter shall apply to common carriers engaged in—

"(a) The transportation of passengers or property wholly by railroad, or partly by railroad and partly by water when both are used under a common control, management, or arrangement for a continuous carriage or shipment; or

"(b) The transportation of oil or other commodity, except water and except natural or artificial gas, by pipe line, or partly by pipe line and partly by railroad or by water—

"From one State or Territory of the United States, or the District of Columbia, to any other State or Territory of the United States, or the District of Columbia, or from one place in a Territory to another place in the same Territory, or from any place in the United States through a foreign country to any other place in the United States, or from or to any place in the United States to or from a foreign country, but only in so far as such transportation or transmission takes place within the United States.

"(2) Transportation subject to regulation.—The provisions of this chapter shall also apply to such transportation of passengers and property and transmission of intelligence, but only in so far as such transportation or transmission takes place within the United States, but shall not apply—

"(a); (b); (c) [Exceptions immaterial to this case.]

"(3) Definitions.—The term 'common carrier' as used in this chapter shall include all pipe-line companies; express companies; sleeping-car companies; and all persons, natural or artificial, engaged in such transportation as aforesaid as common carriers for hire. Wherever the word 'carrier' is used in this chapter it shall be held to mean 'common carrier.' The term 'railroad' as used in this chapter shall include all bridges, car floats, lighters, and ferries used by or operated in connection with any railroad, and also all the road in use by any common carrier operating a railroad, whether owned or operated under a contract, agreement, or lease, and also all switches, spurs, tracks, terminals, and terminal facilities of every kind used or necessary in the transportation of the persons or property designated herein, including all freight depots, yards, and grounds, used or necessary in the transportation or delivery of any such property. The term 'transportation' as used in this chapter shall include locomotives, cars, and other vehicles, vessels, and all instrumentalities and facilities of shipment or carriage, irrespective of ownership or of any contract, express or implied, for the use thereof, and all services in connection with the receipt, delivery, elevation, and transfer in transit, ventilation, refrigeration or icing, storage, and handling of property transported.

"(4) Duty to furnish transportation and establish through routes; division of joint rates.—It shall be the duty of every common carrier subject to this chapter engaged in the transportation of passengers or property to provide and furnish such transportation upon reasonable request therefor, * * *

* * * * * * * *

"Section 6. Schedules and statements of rates, etc., joint rail and water transportation. — (1) Schedule of rates, fares, and charges; filing and posting.—Every common carrier subject to the provisions of this chapter shall file with the commission created by this chapter and print and keep open to public inspection schedules showing all the rates, fares, and charges for transportation between different points on its own route and between points on its own route and points on the route of any other carrier by railroad, by pipe line, or by water when a through route and joint rate have been established. If no joint rate over the through route has been established, the several carriers in such through route shall file, print, and keep open to public inspection as aforesaid, the separately established rates, fares, and charges applied to the through transportation. The schedules printed as aforesaid by any such common carrier shall plainly state the places between which property and passengers will be carried, and shall contain the classification of freight in force, and shall also state separately all terminal charges, storage charges, icing charges, and all other charges which the commission may require, all privileges or facilities granted or allowed, and any rules or regulations which in any wise change, affect, or determine any part or the aggregate of such aforesaid rates, fares, and charges, or the value of the service rendered to the passenger, shipper, or consignee. * * *

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"Section 15.

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"(5) Transportation of livestock in carload lots; services included.—Transportation wholly by

railroad of ordinary livestock in carload lots destined to or received at public stockyards shall include all necessary service of unloading and reloading en route, delivery at public stockyards of inbound shipments into suitable pens, and receipt and loading at such yards of outbound shipments, without extra charge therefor to the shipper, consignee, or owner, except in cases where the unloading or reloading en route is at the request of the shipper, consignee, or owner, or to try an intermediate market, or to comply with quarantine regulations. The commission may prescribe or approve just and reasonable rules governing each of such excepted services. Nothing in this paragraph shall be construed to affect the duties and liabilities of the carriers existing on February 28, 1920, by virtue of law respecting the transportation of other than ordinary livestock, or the duty of performing service as to shipments other than those to or from public stockyards.

* * * * * * * *

"(7) Commission to determine lawfulness of new rates; suspension; refunds.—Whenever there shall be filed with the commission any schedule stating a new individual or joint rate, fare, or charge, or any new individual or joint classification, or any new individual or joint regulation or practice affecting any rate, fare, or charge, the commission shall have, and it is hereby given, authority, either upon complaint or upon its own initiative without complaint, at once, and if it so orders without answer or other formal pleading by the interested carrier or carriers, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, fare, charge, classification, regulation, or practice; and pending such hearing and the decision thereon the commis-

sion, upon filing with such schedule and delivering to the carrier or carriers affected thereby a statement in writing of its reasons for such suspension, may from time to time suspend the operation of such schedule and defer the use of such rate, fare, charge, classification, regulation, or practice, but not for a longer period than seven months beyond the time when it would otherwise go into effect; and after full hearing, whether completed before or after the rate, fare, charge, classification, regulation, or practice goes into effect, the commission may make such order with reference thereto as would be proper in a proceeding initiated after it had become effective. * * *

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"(13) Allowance for service or facilities furnished by shipper.—If the owner of property transported under this chapter directly or indirectly renders any service connected with such transportation, or furnishes any instrumentality used therein, the charge and allowance therefor shall be no more than is just and reasonable, and the commission may, after hearing on a complaint or on its own initiative, determine what is a reasonable charge as the maximum to be paid by the carrier or carriers for the services so rendered or for the use of the instrumentality so furnished, and fix the same by appropriate order, which order shall have the same force and effect and be enforced in like manner as the orders above provided for under this section.

* * * * * * * *

"Section 20. Reports, records and accounts of carriers; mandamus; liability of initial carrier for loss, etc.—(1) Annual reports of carriers; contents; uniform accounts.—The commission is authorized to require annual reports from all common carriers subject to the provisions of this chapter, and from the

owners of all railroads engaged in interstate commerce as defined in this chapter, to prescribe the manner in which such reports shall be made, and to require from such carriers specific answers to all questions upon which the commission may need information. Such annual reports shall show in detail the amount of capital stock issued, the amounts paid therefor, and the manner of payment for the same; the dividends paid, the surplus fund, if any, and the number of stockholders; the funded and floating debts and the interest paid thereon; the cost and value of the carrier's property, franchises, and equipments; the number of employees and the salaries paid each class; the accidents to passengers, employees, and other persons, and the causes thereof; the amounts expended for improvements each year, how expended, and the character of such improvements; the earnings and receipts from each branch of business and from all sources; the operating and other expenses; the balances of profit and loss; and a complete exhibit of the financial operations of the carrier each year, including an annual balance sheet. Such reports shall also contain such information in relation to rates or regulations concerning fares or freights, or agreements, arrangements, or contracts affecting the same as the commission may require; and the commission may, in its discretion, for the purpose of enabling it the better to carry out the purposes of this chapter, prescribe a period of time within which all common carriers subject to the provisions of this chapter shall have, as near as may be, a uniform system of accounts, and the manner in which such accounts shall be kept.

"(2) Period covered by and time for making reports; monthly and special reports; penalty for omissions.—Said detailed reports shall contain all the required statistics for the period of twelve months

ending on the 30th day of June in each year, or on the 31st day of December in each year if the commission by order substitute that period for the year ending June 30th, and shall be made out under oath and filed with the commission at its office in Washington within three months after the close of the year for which the report is made, unless additional time be granted in any case by the commission; and if any carrier, person, or corporation subject to the provisions of this chapter shall fail to make and file said annual reports within the time above specified, or within the time extended by the commission, for making and filing the same, or shall fail to make specific answer to any question authorized by the provisions of this section within thirty days from the time it is lawfully required so to do, such party shall forfeit to the United States the sum of $100 for each and every day it shall continue to be in default with respect thereto. The commission shall also have authority by general or special orders to require said carriers, or any of them, to file monthly reports of earnings and expenses and to file periodical or special, or both periodical and special, reports concerning any matters about which the commission is authorized or required by this or any other law to inquire or to keep itself informed or which it is required to enforce; and such periodical or special reports shall be under oath whenever the commission so requires; and if any such carrier shall fail to make and file any such periodical or special report within the time fixed by the commission, it shall be subject to the forfeitures last above provided.

* * * * * * * *

"(5) Forms of accounts and records; depreciation charges; access to records, etc., by commission.

—The commission may, in its discretion, prescribe the forms of any and all accounts, records, and memoranda to be kept by carriers subject to the provisions of this chapter, including the accounts, records, and memoranda of the movement of traffic, as well as of the receipts and expenditures of moneys. The commission shall, as soon as practicable, prescribe, for carriers subject to this chapter, the classes of property for which depreciation charges may properly be included under operating expenses, and the percentages of depreciation which shall be charged with respect to each of such classes of property, classifying the carriers as it may deem proper for this purpose. The commission may, when it deems necessary, modify the classes and percentages so prescribed. The carriers subject to this chapter shall not charge to operating expenses any depreciation charges on classes of property other than those prescribed by the commission, or charge with respect to any class of property a percentage of depreciation other than that prescribed therefor by the commission. No such carrier shall in any case include in any form under its operating or other expenses any depreciation or other charge or expenditure included elsewhere as a depreciation charge or otherwise under its operating or other expenses. The commission shall at all times have access to all accounts, records, and memoranda, including all documents, papers, and correspondence on February 28, 1920, or thereafter existing, and kept or required to be kept by carriers subject to this chapter, and the provisions of this section respecting the preservation and destruction of books, papers, and documents shall apply thereto, and it shall be unlawful for such carriers to keep any other accounts, records, or memoranda than those prescribed or approved by the commission, and it may employ special agents or

examiners, who shall have authority under the order of the commission to inspect and examine any and all accounts, records, and memoranda, including all documents, papers, and correspondence on February 28, 1920, or thereafter existing, and kept or required to be kept by such carriers. This provision shall apply to receivers of carriers and operating trustees. The provisions of this section shall also apply to all accounts, records, and memoranda, including all documents, papers, and correspondence on February 28, 1920, or thereafter existing, kept during the period of Federal control, and placed by the President in the custody of carriers subject to this chapter.

"(6) Failure to keep accounts and records, or submit same to inspection; penalty.—In case of failure or refusal on the part of any such carrier, receiver, or trustee to keep such accounts, records, and memoranda on the books and in the manner prescribed by the commission, or to submit such accounts, records, and memoranda as are kept to the inspection of the commission or any of its authorized agents or examiners, such carrier, receiver, or trustee shall forfeit to the United States the sum of $500 for each such offense and for each and every day of the continuance of such offense, such forfeitures to be recoverable in the same manner as other forfeitures provided for in this chapter.

* * * * * * * *

"Section 20a. Securities of carriers; issuance, etc.—(1) 'Carrier' defined.—As used in this section the term 'carrier' means a common carrier by railroad (except a street, suburban, or interurban electric railway which is not operated as a part of a general steam railroad system of transportation) which is subject to this chapter, or any corporation

organized for the purpose of engaging in transportation by railroad subject to this chapter.

"(2) Issuance of securities; assumption of obligations; authorization.—It shall be unlawful for any carrier to issue any share of capital stock or any bond or other evidence of interest in or indebtedness of the carrier (hereinafter in this section collectively termed 'securities' or to assume any obligation or liability as lessor, lessee, guarantor, indorser, surety, or otherwise in respect of the securities of any other person, natural or artificial, even though permitted by the authority creating the carrier corporation, unless and until, and then only to the extent that, upon application by the carrier, and after investigation by the commission of the purposes and uses of the proposed issue and the proceeds thereof, or of the proposed assumption of obligation or liability in respect of the securities of any other person, natural or artificial, the commission by order authorizes such issue or assumption. The commission shall make such order only if it finds that such issue or assumption: (a) is for some lawful object within its corporate purposes, and compatible with the public interest, which is necessary or appropriate for or consistent with the proper performance by the carrier of service to the public as a common carrier, and which will not impair its ability to perform that service, and (b) is reasonably necessary and appropriate for such purpose."

[PUBLIC, No. 51—67TH CONGRESS]

(U. S. C., title 7, secs. 181-229)

[H. R. 6320]

An Act to Regulate Interstate and Foreign Commerce in Livestock, Livestock Products, Dairy Products, Poultry, Poultry Products, and Eggs, and for Other Purposes

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

Title I.—Definitions

This act may be cited as the "Packers and Stockyards Act, 1921."

SEC. 2. (a) When used in this Act—

(1) The term "person" includes individuals, partnerships, corporations, and associations;

(2) The term "Secretary" means the Secretary of Agriculture;

(3) The term "meat food products" means all products and by-products of the slaughtering and meat-packing industry—if edible;

(4) The term "livestock" means cattle, sheep, swine, horses, mules, or goats—whether live or dead;

(5) The term "livestock products" means all products and by-products (other than meats and meat food products) of the slaughtering and meat-packing industry derived in whole or in part from livestock; and

(6) The term "commerce" means commerce between any State, Territory, or possession, or the District of Columbia, and any place outside thereof; or between points

within the same State, Territory, or possession, or the District of Columbia, but through any place outside thereof; or within any Territory or possession, or the District of Columbia.

(b) For the purpose of this Act (but not in anywise limiting the foregoing definition) a transaction in respect to any article shall be considered to be in commerce if such article is part of that current of commerce usual in the livestock and meat-packing industries, whereby livestock, meats, meat food products, livestock products, dairy products, poultry, poultry products, or eggs, are sent from one State with the expectation that they will end their transit, after purchase, in another, including, in addition to cases within the above general description, all cases where purchase or sale is either for shipment to another State, or for slaughter of livestock within the State and the shipment outside the State of the products resulting from such slaughter. Articles normally in such current of commerce shall not be considered out of such current through resort being had to any means or device intended to remove transactions in respect thereto from the provisions of this Act. For the purpose of this paragraph the word "State" includes Territory, the District of Columbia, possession of the United States, and foreign nation.

* * * * * * *

Title III.—Stockyards

SEC. 301. When used in this Act—

(a) The term "stockyard owner" means any person engaged in the business of conducting or operating a stockyard;

(b) The term "stockyard services" means services or facilities furnished at a stockyard in connection with the receiving, buying, or selling on a commission basis or otherwise, marketing, feeding, watering, holding, delivery, shipment, weighing, or handling, in commerce, of livestock;

(c) The term "market agency" means any person engaged in the business of (1) buying or selling in commerce livestock at a stockyard on a commission basis or (2) furnishing stockyard services; and

(d) The term "dealer" means any person, not a market agency, engaged in the business of buying or selling in commerce livestock at a stockyard, either on his own account or as the employee or agent of the vendor or purchaser.

SEC. 302. (a) When used in this title the term "stockyard" means any place, establishment, or facility commonly known as stockyards, conducted or operated for compensation or profit as a public market, consisting of pens, or other inclosures, and their appurtenances, in which live cattle, sheep, swine, horses, mules, or goats are received, held, or kept for sale or shipment in commerce. This title shall not apply to a stockyard of which the area normally available for handling livestock, exclusive of runs, alleys, or passage ways, is less than twenty thousand square feet.

(b) The Secretary shall from time to time ascertain, after such inquiry as he deems necessary, the stockyards which come within the foregoing definition, and shall give notice thereof to the stockyard owners concerned, and give public notice thereof by posting copies of such notice in the stockyard, and in such other manner as he may determine. After the giving of such notice to the stockyard owner and to the public, the stockyard shall remain subject to the provisions of this title until like notice is given by the Secretary that such stockyard no longer comes within the foregoing definition.

SEC. 303. After the expiration of thirty days after the Secretary has given public notice that any stockyard is within the definition of section 302, by posting copies of such notice in the stockyard, no person shall carry on the

business of a market agency or dealer at such stockyard unless he has registered with the Secretary under such rules and regulations as the Secretary may prescribe, his name and address, the character of business in which he is engaged, and the kinds of stockyard services, if any, which he furnishes at such stockyard. Whoever violates the provisions of this section shall be liable to a penalty of not more than $500 for each such offense and not more than $25 for each day it continues, which shall accrue to the United States and may be recovered in a civil action brought by the United States.

SEC. 304.[1] It shall be the duty of every stockyard owner and market agency to furnish upon reasonable request, without discrimination, reasonable stockyard services at such stockyard: *Provided*, That in any State where the weighing of livestock at a stockyard is conducted by a duly authorized department or agency of the State, the Secretary, upon application of such department or agency, may register it as a market agency for the weighing of livestock received in such stockyard, and upon such registration such department or agency and the members thereof shall be amenable to all the requirements of this act, and upon failure of such department or agency or the members thereof to comply with the orders of the Secretary under this act he is authorized to revoke the registration of such department or agency and to enforce such revocation as provided in section 315 of this act.

SEC. 305. All rates or charges made for any stockyard services furnished at a stockyard by a stockyard owner or market agency shall be just, reasonable, and nondiscriminatory and any unjust, unreasonable, or discriminatory rate or charge is prohibited and declared to be unlawful.

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[1] Amended by an act of Congress approved May 5, 1926.

SEC. 306. (a) Within sixty days after the Secretary has given public notice that a stockyard is within the definition of section 302, by posting copies of such notice in the stockyard, the stockyard owner and every market agency at such stockyard shall file with the Secretary, and print and keep open to public inspection at the stockyard, schedules showing all rates and charges for the stockyard services furnished by such person at such stockyard. If a market agency commences business at the stockyard after the expiration of such sixty days such schedules must be filed before any stockyard services are furnished.

(b) Such schedules shall plainly state all such rates and charges in such detail as the Secretary may require, and shall also state any rules or regulations which in any manner change, affect, or determine any part or the aggregate of such rates or charges, or the value of the stockyard services furnished. The Secretary may determine and prescribe the form and manner in which such schedules shall be prepared, arranged, and posted, and may from time to time make such changes in respect thereto as may be found expedient.

(c) No changes shall be made in the rates or charges so filed and published, except after ten days' notice to the Secretary and to the public filed and published as aforesaid, which shall plainly state the changes proposed to be made and the time such changes will go into effect; but the Secretary may, for good cause shown, allow changes on less than ten days' notice, or modify the requirements of this section in respect to publishing, posting, and filing of schedules, either in particular instances or by a general order applicable to special or peculiar circumstances or conditions.

(d) The Secretary may reject and refuse to file any schedule tendered for filing which does not provide and give lawful notice of its effective date, and any schedule

so rejected by the Secretary shall be void and its use shall be unlawful.

(e) Whenever there is filed with the Secretary any schedule, stating a new rate or charge, or a new regulation or practice affecting any rate or charge, the Secretary may either upon complaint or upon his own initiative without complaint, at once, and, if he so orders without answer or other formal pleading by the person filing such schedule, but upon reasonable notice, enter upon a hearing concerning the lawfulness of such rate, charge, regulation, or practice, and pending such hearing and decision thereon the Secretary, upon filing with such schedule and delivering to the person filing it a statement in writing of his reasons for such suspension, may suspend the operation of such schedule and defer the use of such rate, charge, regulation, or practice, but not for a longer period than thirty days beyond the time when it would otherwise go into effect; and after full hearing, whether completed before or after the rate, charge, regulation, or practice goes into effect, the Secretary may make such order with reference thereto as would be proper in a proceeding initiated after it had become effective. If any such hearing can not be concluded within the period of suspension the Secretary may extend the time of suspension for a further period not exceeding thirty days, and if the proceeding has not been concluded and an order made at the expiration of such thirty days, the proposed change of rate, charge, regulation, or practice shall go into effect at the end of such period.

(i) After the expiration of the sixty days referred to in subdivision (a) no person shall carry on the business of a stockyard owner or market agency unless the rates and charges for the stockyard services furnished at the stockyard have been filed and published in accordance with this section and the orders of the Secretary made thereunder; nor charge, demand, or collect a greater or less or

different compensation for such services than the rates and charges specified in the schedules filed and in effect at the time; nor refund or remit in any manner any portion of the rates or charges so specified (but this shall not prohibit a cooperative association of producers from bona fide returning to its members, on a patronage basis, its excess earnings on their livestock, subject to such regulations as the Secretary may prescribe); nor extend to any person at such stockyard any stockyard services except such as are specified in such schedules.

(g) Whoever fails to comply with the provisions of this section or of any regulation or order of the Secretary made thereunder shall be liable to a penalty of not more than $500 for each such offense, and not more than $25 for each day it continues, which shall accrue to the United States and may be recovered in a civil action brought by the United States.

(h) Whoever willfully fails to comply with the provisions of this section or of any regulation or order of the Secretary made thereunder shall on conviction be fined not more than $1,000, or imprisoned not more than one year, or both.

SEC. 307. It shall be the duty of every stockyard owner and market agency to establish, observe, and enforce just, reasonable, and nondiscriminatory regulations and practices in respect to the furnishing of stockyard services, and every unjust, unreasonable, or discriminatory regulation or practice is prohibited and declared to be unlawful.

SEC. 308. (a) If any stockyard owner, market agency, or dealer violates any of the provisions of sections 304, 305, 306, or 307, or of any order of the Secretary made under this title, he shall be liable to the person or persons injured thereby for the full amount of damages sustained in consequence of such violation.

(b) Such liability may be enforced either (1) by complaint to the Secretary as provided in section 309, or (2)

by suit in any district court of the United States of competent jurisdiction; but this section shall not in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this act are in addition to such remedies.

SEC. 309. (a) Any person complaining of anything done or omitted to be done by any stockyard owner, market agency, or dealer (hereinafter in this section referred to as the "defendant") in violation of the provisions of sections 304, 305, 306, or 307, or of an order of the Secretary made under this title, may, at any time within ninety days after the cause of action accrues, apply to the Secretary by petition which shall briefly state the facts, whereupon the complaint thus made shall be forwarded by the Secretary to the defendant, who shall be called upon to satisfy the complaint, or to answer it in writing, within a reasonable time to be specified by the Secretary. If the defendant within the time specified makes reparation for the injury alleged to be done he shall be relieved of liability to the complainant only for the particular violation thus complained of. If the defendant does not satisfy the complaint within the time specified, or there appears to be any reasonable ground for investigating the complaint, it shall be the duty of the Secretary to investigate the matters complained of in such manner and by such means as he deems proper.

(b) The Secretary, at the request of the livestock commissioner, board of agriculture, or other agency of a State or Territory having jurisdiction over stockyards in such State or Territory, shall investigate any complaint forwarded by such agency in like manner and with the same authority and powers as in the case of a complaint made under subdivision (a).

(c) The Secretary may at any time institute an inquiry on his own motion, in any case and as to any matter or thing concerning which a complaint is authorized to be

made to or before the Secretary, by any provision of this title, or concerning which any question may arise under any of the provisions of this title, or relating to the enforcement of any of the provisions of this title. The Secretary shall have the same power and authority to proceed with any inquiry instituted upon his own motion as though he had been appealed to by petition, including the power to make and enforce any order or orders in the case or relating to the matter or thing concerning which the inquiry is had, except orders for the payment of money.

(d) No complaint shall at any time be dismissed because of the absence of direct damage to the complainant.

(e) If after hearing on a complaint the Secretary determines that the complainant is entitled to an award of damages, the Secretary shall make an order directing the defendant to pay to the complainant the sum to which he is entitled on or before a day named.

(f) If the defendant does not comply with an order for the payment of money within the time limit in such order, the complainant, or any person for whose benefit such order was made, may within one year of the date of the order file in the district court of the United States for the district in which he resides or in which is located the principal place of business of the defendant or in any State court having general jurisdiction of the parties, a petition setting forth briefly the causes for which he claims damages and the order of the Secretary in the premises. Such suit in the district court shall proceed in all respects like other civil suits for damages except that the findings and orders of the Secretary shall be prima facie evidence of the facts therein stated, and the petitioner shall not be liable for costs in the district court nor for costs at any subsequent stage of the proceedings unless they accrue upon his appeal. If the petitioner finally prevails, he shall be allowed a reasonable attorney's fee to be taxed and collected as a part of the costs of the suit.

SEC. 310. Whenever after full hearing upon a complaint made as provided in section 309, or after full hearing under an order for investigation and hearing made by the Secretary on his own initiative, either in extension of any pending complaint or without any complaint whatever, the Secretary is of the opinion that any rate, charge, regulation, or practice of a stockyard owner or market agency, for or in connection with the furnishing of stockyard services, is or will be unjust, unreasonable, or discriminatory, the Secretary—

(a) May determine and prescribe what will be the just and reasonable rate or charge, or rates or charges, to be thereafter observed in such case, or the maximum or minimum, or maximum and minimum, to be charged, and what regulation or practice is or will be just, reasonable, and nondiscriminatory to be thereafter followed; and

(b) May make an order that such owner or operator (1) shall cease and desist from such violation to the extent to which the Secretary finds that it does or will exist; (2) shall not thereafter publish, demand, or collect any rate or charge for the furnishing of stockyard services other than the rate or charge so prescribed, or in excess of the maximum or less than the minimum so prescribed, as the case may be; and (3) shall conform to and observe the regulation or practice so prescribed.

SEC. 311. Whenever in any investigation under the provisions of this title, or in any investigation instituted by petition of the stockyard owner or market agency concerned, which petition is hereby authorized to be filed, the Secretary, after full hearing finds that any rate, charge, regulation, or practice of any stockyard owner or market agency, for or in connection with the buying or selling on a commission basis or otherwise, receiving, marketing, feeding, holding, delivery, shipment, weighing, or handling, not in commerce, of livestock, causes any undue or unreasonable advantage, prejudice, or preference as be-

tween persons or localities in intrastate commerce in livestock on the one hand and interstate or foreign commerce in livestock on the other hand, or any undue, unjust, or unreasonable discrimination against interstate or foreign commerce in livestock, which is hereby forbidden and declared to be unlawful, the Secretary shall prescribe the rate, charge, regulation, or practice thereafter to be observed, in such manner as, in his judgment, will remove such advantage, preference, or discrimination. Such rates, charges, regulations, or practices shall be observed while in effect by the stockyard owners or market agencies parties to such proceeding affected thereby, the law of any State or the decision or order of any State authority to the contrary notwithstanding.

SEC. 312. (a) It shall be unlawful for any stockyard owner, market agency, or dealer to engage in or use any unfair, unjustly discriminatory, or deceptive practice or device in connection with the receiving, marketing, buying or selling on a commission basis or otherwise, feeding, watering, holding, delivery, shipment, weighing or handling, in commerce at a stockyard, of livestock.

(b) Whenever complaint is made to the Secretary by any person, or whenever the Secretary has reason to believe, that any stockyard owner, market agency, or dealer is violating the provisions or subdivision (a), the Secretary after notice and full hearing may make an order that he shall cease and desist from continuing such violation to the extent that the Secretary finds that it does or will exist.

SEC. 313. Except as otherwise provided in this Act, all orders of the Secretary under this title, other than orders for the payment of money, shall take effect within such reasonable time, not less than five days, as is prescribed in the order, and shall continue in force until his further order, or for a specified period of time, according as is prescribed in the order, unless such order is suspended or modified or set aside by the Secretary or is suspended or set aside by a court of competent jurisdiction.

SEC. 314. (a) Any stockyard owner, market agency, or dealer who knowingly fails to obey any order made under the provisions of sections 310, 311, or 312 shall forfeit to the United States the sum of $500 for each offense. Each distinct violation shall be a separate offense, and in case of a continuing violation each day shall be deemed a separate offense. Such forfeiture shall be recoverable in a civil suit in the name of the United States.

(b) It shall be the duty of the various district attorneys, under the direction of the Attorney General, to prosecute for the recovery of forfeitures. The costs and expenses of such prosecution shall be paid out of the appropriation for the expenses of the courts of the United States.

SEC. 315. If any stockyard owner, market agency, or dealer fails to obey any order of the Secretary other than for the payment of money while the same is in effect, the Secretary, or any party injured thereby, or the United States by its Attorney General, may apply to the district court for the district in which such person has his principal place of business for the enforcement of such order. If after hearing the court determines that the order was lawfully made and duly served and that such person is in disobedience of the same, the court shall enforce obedience to such order by a writ of injunction or other proper process, mandatory or otherwise, to restrain such person, his officers, agents, or representatives from further disobedience of such order or to enjoin upon him or them obedience to the same.

SEC. 316. For the purposes of this title, the provisions of all laws relating to the suspending or restraining the enforcement, operation, or execution of, or the setting aside in whole or in part the orders of the Interstate Commerce Commission, are made applicable to the jurisdiction, powers, and duties of the Secretary in enforcing the provisions of this title, and to any person subject to the provisions of this title.

Title IV.—General Provisions

SEC. 401. Every packer, stockyard owner, market agency, and dealer shall keep such accounts, records, and memoranda as fully and correctly disclose all transactions involved in his business, including the true ownership of such business by stockholding or otherwise. Whenever the Secretary finds that the accounts, records, and memoranda of any such person do not fully and correctly disclose all transactions involved in his business, the Secretary may prescribe the manner and form in which such accounts, records, and memoranda shall be kept, and thereafter any such person who fails to keep such accounts, records, and memoranda in the manner and form prescribed or approved by the Secretary shall upon conviction be fined not more than $5,000, or imprisoned not more than three years, or both.

SEC. 402. For the efficient execution of the provisions of this Act, and in order to provide information for the use of Congress, the provisions (including penalties) of sections 6, 8, 9, and 10 of the Act entitled "An Act to create a Federal Trade Commission, to define its powers and duties, and for other purposes," approved September 26, 1914, are made applicable to the jurisdiction, powers, and duties of the Secretary in enforcing the provisions of this Act and to any person subject to the provisions of this Act, whether or not a corporation. The Secretary, in person or by such agents as he may designate, may prosecute any inquiry necessary to his duties under this Act in any part of the United States.

SEC. 403. When construing and enforcing the provisions of this Act, the act, omission, or failure of any agent, officer, or other person acting for or employed by any packer, stockyard owner, market agency, or dealer, within the scope of his employment or office, shall in every case also be deemed the act, omission, or failure of such packer,

stockyard owner, market agency, or dealer, as well as that of such agent, officer, or other person.

SEC. 404. The Secretary may report any violation of this Act to the Attorney General of the United States, who shall cause appropriate proceedings to be commenced and prosecuted in the proper courts of the United States without delay.

SEC. 405. Nothing contained in this Act, except as otherwise provided herein, shall be construed—

(a) To prevent or interfere with the enforcement of, or the procedure under, the provisions of the Act entitled "An Act to protect trade and commerce against unlawful restraints and monopolies," approved July 2, 1890, the Act entitled "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes," approved October 15, 1914, the Interstate Commerce Act as amended, the Act entitled "An Act to promote export trade, and for other purposes," approved April 10, 1918, or sections 73 to 77, inclusive, of the Act of August 27, 1894, entitled "An Act to reduce taxation, to provide revenue for the Government, and for other purposes," as amended by the Act entitled "An Act to amend sections seventy-three and seventy-six of the Act of August twenty-seventh, eighteen hundred and ninety-four, entitled 'An Act to reduce taxation, to provide revenue for the Government, and for other purposes,'" approved February 12, 1913, or

(b) To alter, modify, or repeal such Acts or any part or parts thereof, or

(c) To prevent or interfere with any investigation, proceeding, or prosecution begun and pending at the time this Act becomes effective.

SEC. 406. (a) Nothing in this Act shall affect the power or jurisdiction of the Interstate Commerce Commis-

sion, nor confer upon the Secretary concurrent power or jurisdiction over any matter within the power or jurisdiction of such Commission.

(b) On and after the enactment of this Act, and so long as it remains in effect, the Federal Trade Commission shall have no power or jurisdiction so far as relating to any matter which by this Act is made subject to the jurisdiction of the Secretary, except in cases in which, before the enactment of this Act, complaint has been served under section 5 of the Act entitled "An Act to create a Federal Trade Commission, to define its powers and duties, and for other purposes," approved September 26, 1914, or under section 11 of the Act entitled "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes," approved October 15, 1914, and except when the Secretary of Agriculture in the exercise of his duties hereunder, shall request of the said Federal Trade Commission that it make investigations and report in any case.

SEC. 407. The Secretary may make such rule, regulations and orders as may be necessary to carry out the provisions of this Act and may cooperate with any department or agency of the Government, any State, Territory, District, or possession, or department, agency or political subdivision thereof, or any person; and shall have the power to appoint, remove, and fix the compensation of such officers and employees, not in conflict with existing law, and make such expenditures for rent outside the District of Columbia, printing, telegrams, telephones, law books, books of reference, periodicals, furniture, stationery, office equipment, travel, and other supplies and expenses as shall be necessary to the administration of this Act in the District of Columbia and elsewhere, and as may be appropriated for by Congress, and there is hereby authorized to be appropriated, out of any money in the Treasury not other-

wise appropriated, such sums as may be necessary for such purpose.

SEC. 408. If any provision of this Act or the application thereof to any person or circumstances is held invalid, the validity of the remainder of the Act and of the application of such provision to other persons and circumstances shall not be affected thereby.

Approved, August 15, 1921.

APPENDIX B

Certified Copy of Opinion of The Municipal Court of Cincinnati in case of *The Cincinnati Union Stock Yard Company* v. *The New York Central Railroad Company* (unreported).

#233982

THE MUNICIPAL COURT OF CINCINNATI

THE STATE OF OHIO
City of Cincinnati } ss.
Hamilton County,

I, ELMER F. HUNSICKER, Clerk of the Municipal Court of Cincinnati, and in whose custody the files, journals, dockets and records of said court are required by the laws of the State of Ohio to be kept, hereby certify that the foregoing copy is taken and copied from the original Opinion in case of *The Cincinnati Union Stock Yard Company* vs. *The New York Central Railroad Company* now on file in the office of the Clerk of the Municipal Court of Cincinnati, and that said foregoing copy has been compared by me with said original Opinion and that the same is a correct transcript thereof.

IN TESTIMONY WHEREOF, I do hereunto subscribe my name officially and affix the seal of said Court at the City of Cincinnati, this 15th day of February, A. D. 1939.

ELMER F. HUNSICKER
Clerk of the Municipal Court.

By BURTON D. HAUCK
Deputy Clerk.

[SEAL OF THE MUNICIPAL COURT]

STATE OF OHIO COUNTY OF HAMILTON

IN THE MUNICIPAL COURT OF

THE CITY OF CINCINNATI

THE CINCINNATI UNION STOCK YARD COMPANY, a corporation *Plaintiff,* —vs.— THE NEW YORK CENTRAL RAILROAD COMPANY, a corporation *Defendant.*	CASE #233982 OPINION: Hess, *J.* 3-3-36.

This cause came on for hearing upon the pleadings and evidence, arguments, and briefs of counsel, and was submitted to the Court for determination. The testimony offered in this case is a transcript of the testimony presented to another Judge of this Court. The Judge to whom the matter was submitted retired from the Bench before deciding the case and by agreement of counsel the record made at the original hearing was introduced as evidence in this hearing.

The plaintiff brings its action on an account, in the short form, as authorized by Sec. 11334, G. C. of Ohio, and claims there is due it from the defendant the sum of Four Hundred and Seventy-three ($473.00) Dollars for loading and un-loading 473 decks of livestock at One ($1.00) Dollar per deck, from January 1, 1935 to August 1, 1935.

The defendant, in its statement of defense, admits that plaintiff rendered these services but claims in substance that the charges of the plaintiff are excessive and unreasonable and that neither this court nor any other court has jurisdiction to decide this controversy for the reason that the issues present a question under the Interstate Commerce Act and the Ohio Public Utilities Act, which can only be

determined by the Interstate Commerce Commission and the Ohio Public Utilities Commission.

To this answer the plaintiff filed a reply, by which the issues of law and fact are joined.

It appears from the testimony that there is no controversy in regard to the essential facts presented in this case. The undisputed and uncontradicted evidence was that the Cincinnati Union Stock Yard was incorporated in 1871 and since that time has continuously conducted a public stock yard in the City of Cincinnati, Ohio; that the plaintiff is posted as a public stock yards by the United States Department of Agriculture, under the Packers and Stockyards Act of 1921; that the charges for stockyards services are contained in tariffs filed with the Secretary of Agriculture, pursuant to the Packers and Stockyards Act; that the plaintiff is employed as an agent by the defendant and certain other carriers to load and unload their live stock consignments at Cincinnati from and into suitable pens at its yards in Cincinnati. Certain other services are rendered by the plaintiff to the defendant, incident to the handling of live stock shipments. Such services are clerical in nature and not an issue in this case.

On January 1, 1921, a certain contract was entered into between the plaintiff and the defendant's predecessor, which provides in substance that the plaintiff would render loading and unloading services for the defendant at its Cincinnati yard for the sum of eighty (80¢) cents per car; there are certain other provisions in the contract respecting duties and responsibilities of the parties, which are not important in this case.

"THIS AGREEMENT, made and entered into this first (1st) day of January, 1921, by and between the Cleveland, Cincinnati, Chicago and Saint Louis Railway Company, a corporation, as First Party, and The Cincinnati Union Stock Yards Company, a corporation, as Second Party, and →

WITNESSETH;

WHEREAS, the loading and unloading of ordinary live stock at public stock yards, except ordinary live stock unloaded or reloaded, en route in order to try an intermediate market, or stopped on account of quarantine regulation, becomes the duty of the carrier under the provisions of Paragraph 5, Section 15 of the Interstate Commerce Act, as amended February 28th, 1920, and which reads as follows:

> 'Transportation wholly by railroad of ordinary livestock in carload lots destined to or received at public stockyards shall include all necessary service of unloading and reloading en route, delivery at public stockyards of inbound shipments into suitable pens, and receipt and loading at such yards of outbound shipments, without extra charge therefor to the shipper, consignee or owner, except in cases where the unloading or reloading en route is at the request of the shipper, consignee or owner, or to try an intermediate market or to comply with quarantine regulations. The Commission may prescribe or approve just and reasonable rules governing each of such excepted services. Nothing in this paragraph shall be construed to affect the duties and liabilities of the carriers now existing by virtue of law respecting the transportation of other than ordinary livestock, or the duty of performing service as to shipments other than those to or from public stockyards.'

NOW, THEREFORE, by reason of the premises and in consideration of the payments and mutual agreements hereinafter set forth, it is mutually agreed by and between the parties hereto as follows:

1. Said Second Party will load or unload said ordinary live stock and will make and keep all records and

perform the necessary labor in connection therewith, including the following:

(a) Accurate count of all live stock loaded and unloaded.

(b) Accurate record will be kept of all live stock loaded and unloaded, with the ordinary notations as to the condition of the stock. In loading cars, said Second Party shall exercise due care to prevent the overloading or crowding of the stock.

2. That all services in connection with the loading and unloading of all shipments of live stock handled by said First Party as a common carrier, destined to, originating at, or which may be stopped en route for feed, water and rest at said Stock Yards of said Second Party, shall be performed by said Second Party. Said First Party agrees to pay said Second Party for its services under this agreement at the rate of eighty cents (80¢) per car of live stock loaded, unloaded, or reloaded, each operation being subject to a separate 80¢ charge, said payments to be made from month to month, upon presentation of bills therefor by said Second Party.

3. It is agreed that the amount of the charges assessed by said Second Party against the shippers for unloading and reloading ordinary live stock stopped en route to try the market or stopped on account of quarantine regulations shall be set out by said Second Party on "advance only" way bills to facilitate the collection of said charges by the First Party at destination.

4. As between the parties hereto, said Second Party agrees to exercise due diligence in the loading and unloading of live stock handled under this agreement and agree to indemnify, protect and save harmless said First Party against all loss and damage or expense on account

of its failure to exercise such diligence. Said Second Party shall be deemed to be in charge of and responsible and assume all liability, but as warehousemen only, for all stock handled by it for said First Party under this agreement, as follows:

(a) On inbound live stock from the time car door is opened by employees of said Second Party.

(b) On outbound live stock until said stock shall have been placed in cars and car doors closed.

(c) On live stock unloaded for feed, water and rest, stopped en route to try market, or stopped on account of quarantine regulations, the responsibility of said Second Party begins when the car doors are opened by employees of said Second Party and continues until said live stock is reloaded and the car doors closed. In connection with said live stock, said Second Party assumes the responsibility for reloading the identical stock that was unloaded, being liable only as warehousemen between the time of unloading and reloading. It is agreed, however, that said Second Party shall not reload stock unloaded for food, water and rest until after the expiration of the period provided by Statute and that stock unloaded on account of quarantine regulations shall not be reloaded until regulations have been complied with, and that said Second Party shall exercise due diligence in loading and unloading such stock. Said Second Party agrees to indemnify, protect and save harmless said First Party from any and all loss and damage or expense, incurred by said First Party account of the failure of said Second Party to comply with the provisions of this paragraph, notwithstanding anything set forth in this agreement as to the limitation of responsibility of said Second Party as being that of a warehouseman. Nothing in this Paragraph 4, shall make the Second Party responsible for injuries to said live stock caused

by the negligence of said party of the First Part or of its Agents or employees.

5. Said First Party, at its own cost and expense, agrees to place all cars for unloading and loading at appropriate pens, to be designated by said Second Party, and remove therefrom all empty cars and cars that have been loaded. Said Second Party agrees to give notice to said First Party as promptly as possible after cars have been loaded to enable said First Party to remove said cars.

6. This agreement shall be effective as of January first (1st), 1921 and shall remain in effect until terminated by either party giving to the other party, at its office in Cincinnati, Ohio, thirty (30) days' written notice of such party's intention to terminate, and shall then terminate at the end of said thirty days unless said notice is previously withdrawn.

IN WITNESS WHEREOF, the parties hereto have duly executed this agreement in duplicate on the day and year first above written.

THE CLEVELAND, CINCINNATI, CHICAGO AND SAINT LOUIS RAILWAY COMPANY,

THE CINCINNATI UNION STOCK YARDS COMPANY."

Thereafter, on December 29, 1925, there was a modification of this contract, providing for the payment of 80¢ per car and it was agreed between the parties that 75¢ per deck would be the charge for loading and unloading services at the plaintiff's yards, effective January 1, 1926.

On November 19, 1934, the plaintiff caused a letter to be sent to the defendant, which reads as follows:

"Referring to our agreement with you dated as of January 1, 1921, as modified under date of January 1,

1926, for the loading and unloading of live stock, etc. at our yards in Cincinnati, we hereby exercise our option to terminate this agreement as of December 31, 1934. While we have the right under the contract to terminate on thirty days' notice, we give you this longer notice as a matter of courtesy.

"Beginning January 1, 1935, our charge will be $1.00 per deck of live stock loaded, unloaded or reloaded into railroad cars. Pending execution of a new contract to this effect, the other provisions of the agreement of January 1, 1921, will be operative.

"Kindly acknowledge receipt."

It appears from the record that plaintiff received no reply to this letter, at least prior to January 1, 1935, although several conferences were had after January 1, 1935, wherein the increased charge of plaintiff for loading and unloading services from 75¢ to $1.00 per deck were discussed.

The Court is unable to find any place in the record where the defendant requested that plaintiff discontinue its services, but it does appear from the record that the defendant availed itself of the services of the plaintiff for the entire period in question. The record discloses that the defendant received monthly statements from the plaintiff, which statements itemized the number of decks loaded and unloaded during the preceding month, at a charge of $1.00 per deck.

It is further shown by the record that the plaintiff company is not owned or controlled in any manner by any railway company. No railway company is a stockholder or railway officials officers of the plaintiff company. The plaintiff company is really independent of railway control or ownership. The plaintiff company owns no cars or locomotives or rolling stock of any kind. It does not now nor has it at any time filed tariffs with the Interstate Commerce Commission, nor has the Interstate Commerce Commission ever requested it so to do.

It does appear from the record that the plaintiff company owns all the stock of a paper corporation named the Cincinnati & Milford Railway Company. This corporation has never operated a railway nor acted in the capacity of a common carrier, although at one time it owned a switch-track connecting the B & O Railroad with the stock yards property.

The real question for the Court to determine is whether or not this Court has jurisdiction in a case involving the charges of the Cincinnati Union Stock Yard Company for loading and unloading services rendered to the defendant. The defendant claims that these charges are subject to the regulations of the Interstate Commerce Commission.

The answer to this question depends upon whether or not the plaintiff, in performing loading and unloading services, is a common carrier, engaged in transportation. If it is not a common carrier, engaged in transportation of an interstate commerce nature, then neither it nor its charges are subject to the regulations of the Interstate Commerce Commission.

In respect to the question of whether the Public Utilities Commission of Ohio has jurisdiction over any of the charges in question, it is agreed by counsel for both parties that if the Interstate Commerce Act does not apply the Public Utilities Act or Acts would likewise not apply.

The defendant questions that this action can be brought on an account in the short form. The Court is of the opinion that the action is properly brought on an account, by virtue of Sec. 11334 G. C. of Ohio.

Has this Court jurisdiction over the subject matter by reason of the fact that the plaintiff company has failed to file with the Interstate Commerce Commission tariffs regulating the charge for the loading and unloading service rendered by the plaintiff to the defendant company?

In order to answer this question, it is necessary to refer to the Interstate Commerce Act and to review pertinent cases in which the Courts have been confronted with similar issues.

Sec. 1 of the Interstate Commerce Act provides as follows:

"(1) CARRIERS SUBJECT TO REGULATION. The provisions of this chapter shall apply to *common carriers* engaged in—

"(A) The transportation of passengers or property wholly by railroad, or partly by railroad and partly by water when both are used under a common control, management, or arrangement for a continuous carriage or shipment; or

". . .

"(2) TRANSPORTATION SUBJECT TO REGULATION. The provisions of this chapter shall also apply to such transportation of passengers and property and transmission of intelligence, but only in so far as such transportation or transmission takes place within the United States, but shall not apply . . ."

Subsection 3 of Sec. 1, defines a "common carrier" as used in the Act to include:

". . . all pipe-line companies; telegraph, telephone, and cable companies operating by wire or wireless; express companies; sleeping-car companies; and all persons, natural or artificial, engaged in such transportation or transmission as aforesaid as *common carriers* for hire. Wherever the word 'carrier' is used in this chapter it shall be held to mean 'common carrier'."

The term "railroad" as used in the Act is defined to include:

". . . all bridges, car floats, lighters, and ferries used by or operated in connection with any railroad, and also all the road in use by any *common carrier* operating a railroad, whether owned or operated under a

contract, agreement, or lease, and also all switches, spurs, tracks, terminals, and terminal facilities of every kind used or necessary in the transportation of the persons or property designated herein, including all freight depots, yards, and grounds, used or necessary in the transportation or delivery of any such property."

The term "transportation" is defined as including:

". . . locomotives, cars, and other vehicles, vessels, and all instrumentalities and facilities of shipment or carriage, irrespective of ownership or of any contract, express or implied, for the use thereof, and all services in connection with the receipt, delivery, elevation, and transfer in transit, ventilation, refrigeration or icing, storage, and handling of property transported."

It would appear from a reading of the above sections of the Interstate Commerce Act that it applies to common carriers engaged in performing transportation service. It would further appear that the controlling factor in deciding the Interstate Commerce Act's applicability is whether or not the person to be charged under the Interstate Commerce Act is engaged as a common carrier.

The defendant contends that the loading and unloading of livestock from the decks of cars is an incident to common carrier transportation. Section 15(5) of the Interstate Commerce Act has considered this point. This section reads as follows:

"TRANSPORTATION OF LIVESTOCK IN CARLOAD LOTS; SERVICES INCLUDED. Transportation wholly by railroad of ordinary livestock in carload lots destined to or received at public stock yards shall include all necessary service of *unloading and reloading en route, delivery at public stockyards of inbound shipments into suitable pens,* and *receipt and loading at such yards of outbound shipments, without extra charge* therefore to the shipper, consignee or owner, . . ."

This section has taken into consideration the question at issue in this case and places upon the railroad company or common carrier the responsibility of loading and unloading livestock. It does not designate that the common carrier must employ the services of any particular agency in the loading and unloading service but does place upon the common carrier the responsibility of seeing to it that this kind of service is done, and further places upon the carrier the duty of performing this service *without extra charge* to the shipper. The railroad companies are obliged, in many instances, to employ the services of persons, firms and corporations who have no connection whatever with the railroad except to perform a specific service for a consideration.

The Court then comes to the consideration of the question of where the right of the parties to contract between themselves and agree upon a sum to be paid for service stops and where the Interstate Commerce Commission must step in and make the contract for them.

The matter of charges made by stock-yards companies engaged in the same kind of service as that rendered by the plaintiff company in this case has been before the courts on many occasions. A review of those cases disclosed that the court has based the decision in each case upon the facts surrounding that particular case.

In the case of *Atchison, Topeka, Sante Fe Railroad Company* vs. *Kansas City Stock Yards Company*—30 ICC 992, decided in 1915, the Interstate Commerce Commission held that the Kansas City Stock Yards was not a common carrier. It arrived at this decision after a very careful analysis of the manner in which the Kansas City Stock Yards Company was operated. Again, in the case of *Union Stock Yards of Omaha* vs. *The United States*—169 Fed. 404, it was held that the stock yards company was not a common carrier and thus not amenable to the Safety Appliance Law. The Court in that case uses significant language:

"It must be conceded that the stockyards company would not be a common carrier, nor the property used by it a railroad, if its operations were confined to maintaining the sheds or pens, to unloading shipments thereto, to loading shipments therefrom, and to feeding, watering, caring for, and otherwise handling live stock therein. But its operations are not thus confined. On the contrary, they include the maintenance and use of railroad tracks and locomotives, the employment of a corps of operatives in that connection, and the carriage for hire over its tracks of all live stock destined to or from the sheds or pens, which, in effect, are the depot of the railroad companies, for the delivery and receipt of shipment of live stock at South Omaha."

In the matter of the *Union Stock Yards and Transit Company of Chicago*, reported in 226 U. S. 286, the Court, after a very careful review of the manner of operation and property controlled by the Union Stock Yards Company, came to the conclusion that this stockyard, under the circumstances and facts relating thereto, was engaged as a common carrier and it will be observed from the opinion of the Court that the decision was reached solely on the facts as they applied to that case and that no definite example of demarkation between what constitutes common carrier and non-carrier service may be drawn, as applied to stock yard service.

The question of whether or not the Cincinnati Union Stock Yard Company is a common carrier has been before the Interstate Commerce Commission and the Courts. The case of *E. Kahn's Sons Company* vs. *B & O Railroad Company*, 192 ICC 705, and the decision in the case under the style of *U. S. of Amer. ex rel* vs. *Interstate Com. Com.*—74 Fed. 2nd Ed. 948, seem to prove conclusively that the Cincinnati Union Stock Yard Company is not a common carrier but as a matter of fact is a non-carrier corporation.

If, therefore, the Cincinnati Union Stock Yard Company is a non-carrier corporation, does the fact that it enters into a contract with a railroad company to perform services which the railroad company is obliged by law to perform make it, for the purposes of that contract only, a common carrier, engaged in transportation service which may come under the jurisdiction of the Interstate Commerce Commission?

The mere fact that the Cincinnati Union Stock Yards is a public utility does not of itself make it amenable to Interstate Commerce tariffs. There is nothing in the law which makes the railroad, or common carrier, use the service of the Cincinnati Union Stock Yard Company. If the railroad was by law obliged to use the services offered by the Cincinnati Union Stock Yard Company and the Cincinnati Union Stock Yard Company was by law obliged to render such service, then it would appear to the Court that there would be justification for the contention that some agency other than the contracting parties should decide what the charges for such services should be. There is nothing that the court is able to find which indicates that the services of the Cincinnati Union Stock Yard Company must be utilized by any of the common carriers shipping livestock into or from Cincinnati. They might well stop their trains at some other yards or place and arrange to perform their own loading and unloading service. The defendant is obliged, by reason of the regulations which the Court has already quoted, to absorb this service cost. Certainly there could be no question raised as to what the common carrier might spend to perform this service, in the event it undertook to perform the service itself. It might pay its employees large or small salaries.

It would appear in the case of the *U. S.* vs. *Union Stock Yard and Transit Company*, concerning the loading and unloading of livestock, which decision was rendered December 11, 1935, that the Interstate Commerce Commission reached its decision primarily on precedent, and since that

stock yards company has, by reason of its operation of railroads and interchanging directorate in the past established itself as a common carrier it is still a common carrier to such an extent that, in the opinion of the Interstate Commerce Commission it is to continue to be characterized as a common carrier. This is still another argument in support of the contention that the Interstate Commerce Commission and the Courts have seen fit to decide these stock yards service cases strictly and solely upon the facts surrounding each individual case or yard operation.

The Court is unable to find any law preventing the railroad company or common carrier from engaging the services of whoever it may deem necessary to assist it in its duty as a common carrier. The defendant company, in the instant case, by continuing to use the services of the Cincinnati Union Stock Yard Company, after notice of the increase in price from seventy-five cents (75¢) to one dollar ($1.00) per deck, pursuant to their contract, obligated itself to pay the amount stipulated in this contract. The Court is obliged to determine from the facts in this case and from the contractual relations of the parties, that the Cincinnati Union Stock Yard Company is not a common carrier; that the contracts between the defendant company and its predecessor and the Cincinnati Union Stock Yard Company were legal and valid contracts: and further, that the defendant company acquiesced in the terms and conditions of the rate of one dollar ($1.00) per deck.

Having considered the issues presented herein, the Court is of the opinion that the plaintiff is entitled to recover.

An entry may be drawn in accordance with this opinion.